TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 365.

BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, AND EDWARD H. GAYNOR, APPELLANTS,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 10, 1901.

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1 To the circuit court of the United States for the southern district of New York:

The petition of Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, respectfully shows to this court:

First. That your petitioners are and at all the times hereinafter mentioned were, citizens of the United States; Benjamin D. Greene being a resident of the State of Connecticut; John F. Gaynor and William T. Gaynor being residents of the State of New York, and Edward H. Gaynor being a resident of the State of Massachusetts, and they are not nor is either of them in any way connected with the land or naval forces of the said United States.

Second. That your petitioners and each of them are and is imprisoned and restrained of their liberty in the custody of William Henkel, United States marshal for the southern district of New York.

Third. That your petitioners have been committed and are detained by virtue of a warrant of removal under section 1014 of the Revised Statutes of the United States, signed by the Hon. Addison Brown, judge of the district court of the United States for the southern district of New York, and not by virtue of any judgment, decree or final order thereof.

A copy of such warrant of removal being hereto annexed marked Exhibit "G."

2 Fourth. That the cause or pretence of the imprisonment and restraint of your petitioners according to the best of their knowledge and belief, is that warrants for their arrest were issued by John A. Shields, United States commissioner, and that certain proceedings hereinafter set forth were had before such commissioner, who committed your petitioners to await a warrant of their removal to the eastern division of the southern district of Georgia, for trial upon an alleged indictment, purporting to have been found by the grand jury for the said eastern division of the southern district of Georgia, and that upon the proceedings before said commissioner, and upon application of the United States attorney for the southern district of Georgia, the judge of the district court of the United States for the southern district of New York, has granted the said warrant of removal.

Fifth. That the imprisonment and detention of your petitioners is without authority of law, and the said proceedings before the said commissioner are illegal, and the said warrant of removal was illegally issued, and in violation of articles IV and V of the Constitution of the United States, and section 1 of the 14th article of amendment thereto, which provide that the right of your petitioners to be secured in their persons against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon

3 probable cause, supported by oath of *of* affirmation and particular- describing the person to be seized; and that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that no

person shall be deprived of life, liberty or property without due process of law.

Sixth. That according to the best knowledge and belief of your petitioners, the basis of the proceedings before said commissioner, and upon which the warrant for their arrest was issued, was a complaint made by one Clarence S. Houghton, assistant United States attorney for the southern district of New York, which complaint was based upon information contained in an alleged indictment found by an alleged grand jury of the United States in and for the southern district of Georgia, and brought into the United States district court for said southern district, on the 8th day of December 1899; a copy of said complaint being hereto annexed and marked "A;" that said complaint was thereafter amended and a copy of said amended complaint is hereto annexed marked "B;" that said alleged indictment, as your petitioners are informed and believe, purported to be found under and in pursuance of sections 5438 and 5440 of the Revised Statutes of the United States, and charges your petitioners with conspiracy to defraud the said United States. That the said body purporting to be a grand jury for the said eastern
4 division of the *of the* southern district of Georgia, was not a legal grand jury empaneled and sworn according to law and particularly according to the requirements of section 2 of chapter 52 of the act of June 30, 1879, as shown by the record of testimony taken before said commissioner and which is hereto annexed and made a part hereof. That the said alleged indictment also was not found and returned by a grand jury drawn in the eastern division of the said southern district of Georgia, as it purports upon its face to have been, but was drawn in the western division of the said district, all of which was illegal and contrary to the statute in such case made and provided.

That the complaint of Clarence S. Houghton hereinbefore referred to and by which the proceedings before said commissioner, John A. Shields, were initiated, is hereto annexed marked Exhibit "A."

That under said complaint a warrant for the arrest of your petitioners was issued by said commissioner copy of which is hereto annexed marked Exhibit "A 1" and your petitioners voluntarily appeared before said commissioner and demanded an examination on the charges contained in the complaint made against them. Upon such examination proceedings were had as follows:

The defendants by their counsel moved to dismiss the complaint because the complaint set forth no crime or offence under the laws of the United States.

This motion was denied and an exception taken. The complaint was thereafter amended, such amended complaint being hereto annexed marked Exhibit "B."

5 The motion to dismiss the complaint was again renewed after such amendment on the same grounds, and the same was denied, to which the defendants duly excepted.

The Government thereupon offered in evidence a certified copy of the indictment set out in the amended complaint. Counsel for the defendants objected to the reception of said certified copy in evi-

dence on the ground that there was no statute or authority for receiving as evidence, in the United States court, a copy certified by the clerk of the court. This objection was overruled and an exception duly taken.

Evidence was then given on behalf of the Government tending to show that the defendants before the court were the defendants under their respective names mentioned in the indictment and the Government thereupon rested and the defendants, your petitioners, then offered evidence tending to show that there was no probable cause to believe that any offence charged in the complaint had been committed or that the defendants, your petitioners, were guilty of the offences charged in the indictment, which evidence was all excluded by the commissioner.

The commissioner thereupon held the defendants to await a warrant of removal by the United States district judge and thereafter a motion was made before Hon. Addison Brown, United States district judge for the southern district of New York, by the Government for a warrant of removal to remove the defendants
6 to the southern district of Georgia for trial upon the indictment referred to in the complaint and hereinbefore set out.

This motion was opposed by your petitioners and after due deliberation denied by the United States district judge, and an opinion rendered by him, of which a copy is hereto annexed marked Exhibit "C."

That thereafter and on motion of the United States attorney, an order was made by the United States district judge of which a copy is hereto annexed marked Exhibit "D."

That pursuant to said order further proceedings were had before John A. Shields, beginning on the 6th day of July 1900, at 2 p. m. The defendants objected to proceeding under said order and stated that they did not waive the right to any objection there may be to the regularity of the proceedings by reason of said order and objected that the commissioner had no right as a commissioner to further investigate the question inasmuch that by his holding the defendants to await a warrant of the removal of the district judge he had no further jurisdiction over the defendants.

A large number of witnesses were examined before the commissioner on behalf of the Government and on behalf of the defendants, your petitioners, which evidence was reported to the United States district judge for the southern district of New York, together with a finding by the United States commissioner, John A.
7 Shields, as follows:

"NEW YORK, *February 25th*, 1901.

"A careful examination of the evidence and the briefs, all of which are voluminous, establishes, in my judgment, that a case of probable cause has been made out requiring the defendants to be held to await a warrant of removal to the southern district of Georgia, being the district in which the indictment was found. The defendants, Benjamin D. Greene, Edward H. Gaynor, William T. Gaynor and John F. Gaynor, are accordingly held to await a war-

rant of removal to be issued by the United States district judge for the southern district of New York, or otherwise dealt with according to law.

JOHN A. SHIELDS,
United States Commissioner, S. D. of N. Y."

The matter again came before Hon. Addison Brown, United States district judge for the southern district of New York, and an application was made to him for a warrant to remove the defendants to the southern district of Georgia for trial on the indictment hereinbefore referred to. This application was opposed by the defendants, your petitioners, on various grounds; among others:

8 1st. That the indictment referred to in the complaint stated no crime or offence against the laws of the United States.

2nd. That there was no valid indictment upon which the defendants could be tried for the reason that the said indictment had not been found and returned by a grand jury drawn in accordance with the provisions of the statutes of the United States.

3rd. That the evidence then before the court did not show any probable cause to believe that the offence set out in the complaint had been committed by the defendants.

4th. That the finding of the commissioner, as hereinbefore set out, that there was probable cause to believe that an offence had been committed and that there was probable cause to believe that the defendants, your petitioners, had committed the offence, was without force or effect inasmuch as under the order sending the matter back to the commissioner, he only acted or could act as the arm of the court to take the testimony. That the question of probable cause must be passed upon by the district judge.

The said district judge refused to consider the question of probable cause and held that a warrant to remove the defendants to the southern district of Georgia should issue and thereupon rendered an opinion, a copy of which is hereto annexed, marked Exhibit "E."

9 That all the evidence taken before said commissioner bearing upon the question of the drawing and formation of the alleged grand jury that found the alleged indictment stated in the complaint in this action, is hereto annexed, marked Exhibit "F."

That such evidence truly and fully sets forth the facts in relation to the preparation of the jury-box and the drawing of the alleged grand jury from said jury-box, which alleged grand jury presented and found the alleged indictment mentioned in the complaint herein, and which is heretofore referred to and set out.

Seventh. That the petitioners were not in the southern district of Georgia at the time said alleged grand jury was drawn, nor at the time said alleged indictment was presented and filed in the United States district court for the eastern division of the southern district of Georgia, and were not informed of the drawing of such alleged grand jury prior to the time the said indictment was filed. They did not know of the finding of such alleged indictment for which the same was filed and presented, and that prior to their arrest on

the warrant of Commissioner Shields, as hereinbefore set forth, they were not arrested and held to await the action of any grand jury in said southern district of Georgia, or elsewhere, nor had they prior to the proceedings on their appearance before Commissioner Shields, as herein set out, any opportunity to object to said alleged
10 grand jury or any action by it.

Eighth. Your petitioners further show that at the time of the drawing of the said alleged grand jury, namely, November 22nd 1899, Emory Speer was the United States district judge for the southern district of Georgia, and that he drew the said alleged grand jury; made the order in regard thereto hereinbefore referred to, and held the term of court at which the said alleged grand jury presented and filed the said alleged indictment.

That by law the said Emory Speer is required to hold the several terms of the United States district court for the eastern division of the southern district of Georgia.

That the said Emory Speer will hold the term of the United States district court for the eastern division of the southern district of Georgia, fixed by statute for the second Tuesday in August 1901, at which term and time your petitioners by said warrant of removal are to appear for trial, and unless this court hears and determines the questions herein set forth relating to said alleged grand jury and its right to act in the premises, the said district judge of the southern district of Georgia will at said term or some subsequent term of said court, have before him and be obliged to pass on, the question of the validity and legality of the orders made by him relating to said alleged grand jury, and also as to the legality of his own acts in drawing said alleged grand jury.

11 Ninth. Your petitioners further show that at the time of the filing of said alleged indictment, Marion Erwin was and is now, the United States district attorney for the southern district of Georgia, and is also assistant United States attorney in charge of this removal proceeding in the southern district of New York.

That as appears by Exhibit "337" put in evidence before Commissioner John A. Shields, and hereinbefore set out as part of Exhibit "F," that while your petitioners were in New York pending such removal proceeding and while they were under bail in such proceeding in the southern district of New York, the said Marion Erwin required them to appear in the eastern division of the southern district of Georgia to make any objection they might have to said alleged grand jury.

That your petitioners are informed and believe, that he now claims and insists that because of your petitioners' failure to appear as above required that they are barred and estopped in that court from questioning the legality and validity of said alleged grand jury.

If this contention be sustained, then, unless this court hears and passes on the said questions, these petitioners will be tried on an alleged indictment in said court in Georgia, although the fact is that such indictment was never found by any legally authorized grand

jury, but was presented and filed in court by a body of men purporting to be a grand jury in whose selection and drawing
12 every statute of the United Statutes relating thereto was disregarded and set at naught.

That the petitioners are now held for trial for an infamous crime without the indictment of a grand jury in violation of the rights secured to them by the Constitution of the United States.

Tenth. Your petitioners further show and state the fact to be that the alleged grand jury that found and presented the alleged indictment under which the petitioners are to be tried upon the execution of the said warrant of removal, was drawn from a jury-box that did not have three hundred names of persons qualified to act as jurors in it at the time of such drawing.

That the box from which said alleged grand jury was drawn was not prepared by a jury commissioner and clerk of the court, by each putting in alternately the name of a person as required by law and that such grand jury was without power or authority to hear evidence or do any act required of a lawfully qualified and legally constituted grand jury.

Eleventh. That notwithstanding the above facts, the said United States marshal for the southern district of New York, and persons acting under his orders and authority, are detaining your petitioners and are about to remove them to the eastern division of the southern district of Georgia for trial upon the said pretended indict-
13 ment hereinbefore referred to, and in pursuance of the proceedings had before the said commissioner and the warrant of removal issued thereupon by the district judge.

Twelfth. That the detention of said petitioners and their removal in pursuance of said proceedings and warrant are without authority of law and that any further proceedings in pursuance thereof, and the further detention and imprisonment of your said petitioners, would be and is, unlawful.

Wherefore your petitioners pray that a writ of *habeas corpus* may issue out of this court directed to the United States marshal for the southern district of New York, commanding him to take the bodies of your petitioners before this honorable court as shall be directed in said writ, so that this court may be able to proceed thereupon and to do what shall appear to them of right ought to be done.

Dated, New York, June 8th 1901.

B. D. GREENE.
JOHN F. GAYNOR.
WM. T. GAYNOR.
EDWARD H. GAYNOR.

14 UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, being severally duly sworn, do depose and say

that the facts set forth in the above petition subscribed by them are true.

B. D. GREENE.
JOHN F. GAYNOR.
WM. T. GAYNOR.
EDWARD H. GAYNOR.

Sworn to before me this 8th day of June 1901.
JOHN A. SHIELDS,
U. S. Comm'r.

15 EXHIBIT "A." Referred to in Annexed Petition.

THE UNITED STATES
vs.
BENJAMIN D. GREENE ET ALS.

Complaint for removal of defendants Benjamin D. Greene, Edward H. Gaynor, William T. Gaynor, and John F. Gaynor to the district court of the United States of America for the southern district of Georgia.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Clarence S. Houghton, assistant United States attorney, in and for the southern district of New York, being duly sworn, says on information and belief:

That heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and ninety-seven, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, being evil-disposed persons, all late of the southern district of Georgia, did, within said district, and within the jurisdiction of said court, wrongfully, knowingly and feloniously amongst themselves and with divers other persons to the grand jurors of the aforesaid southern district of Georgia unknown, conspire, confederate and agree together to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, and which was then and there in process of execution by them:

16 That said fraudulent scheme was first devised, concocted and put in operation in said southern district of Georgia by and between the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, on or about the year of our Lord one thousand eight hundred and ninety-one, has been continuously in process of execution in said southern district of Georgia by and between said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter from about the said year eighteen hundred and ninety-one until on or about the first day of October, in the year of our Lord eighteen hundred and ninety-nine:

That the said Oberlin M. Carter was an officer of the United States Army, in the corps of engineers, and had been continuously from about the year of our Lord eighteen hundred and eighty-eight until about the twentieth day of July, in the year of our Lord eighteen hundred and ninety-seven, as such engineer officer, in local charge in said southern district of Georgia, of what is usually called the "Savannah district" for the improvement by the United States of rivers and harbors, and as such officer he was engaged in and about the execution of such river and harbor improvements as were made in said Savannah district, within the southern judicial district of Georgia, during said period; and as such officer in charge of said Savannah district he was vested with sundry powers, duties and discretion, during said period, and, amongst other things, with power, duty and discretion in, proposing from time to time projects for the improvement of rivers and harbors in said district; with power, duty and discretion in devising and drafting from time to time specifications for contracts for the improvements proposed to be made in said district; and with power, duty and discretion in, from time to
17 time, drafting and suggesting forms of advertisements for giving notice to the public that competitive bids would be received by him for the construction of such proposed works; and with power, duty and large discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids; and with power, duty and discretion in suggesting and causing to be fixed and fixing the time, designated in specifications for contracts, within which the successful bidder would be required to commence work; and with power, duty and discretion in giving out information in regard to such contracts to be let; and with power, duty and discretion in receiving proposals for and recommending the awarding of such contracts; and with power, duty and discretion in approving or rejecting the bonds required to be given by such contractors; and with power, duty and discretion in superintending the work to be done by such contractors in said district and of approving and accepting or of rejecting the work done by such contractors according as same was in accordance with the requirements of such contracts or not; and with power, duty and discretion in suggesting and approving modifications of such contracts; and with power, duty and discretion in approving or rejecting the accounts rendered to him by such contractors for work done or claimed by such contractors to be done by them, according as said accounts should be fair and honest, or false and fraudulent; and when in funds as a disbursing officer he was vested with power, duty and discretion in paying such contractors or refusing to pay such contractors the amounts claimed by them to be due them for work done according as such claims were honest and fair or false and fraudulent:

That the said fraudulent scheme contemplated; that the
18 said Oberlin M. Carter, should, as such engineer officer of the United States so in charge of said Savannah district, so fraudulently exercise the said powers of his office and the said discretion so vested in him, that competition in the bidding for such contracts

to be let for the United States through him should be cut off, and that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, in the name of some one of them, or of some other person or corporation for their benefit, would be the only real bidders for such contract work in said district, and that all contracts which were from time to time let for the improvements of the rivers and harbors in said Savannah district would be obtained by some one or other of said conspirators, or by and in the name of some other person or corporation, but secretly for the benefit of said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, and so that the said works in said district put out to be done for the United States on contracts would be let at high and exorbitant cost to the United States of America; and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should with fraudulent intent so devise and draft the specifications of contracts for constructing jetty works and training walls to be from time to time let by the United States in said district through him, as to provide that the engineer in charge as aforesaid, might at his option require to be put in the work by the contractor a large number of square yards of one specified design of what is usually called a log and brush mattress, to be paid for by the United States to the contractor by the square yard, which design of mattress if so required to be put in by the engineer, would make the cost of the fulfilling of the contract comparatively very great and ex-
19 pensive to the contractor, and which specifications should further provide that the engineer in charge as aforesaid, might at his option, and at the same price per square yard to be paid by the United States to the contractor, in lieu of the use of said design of log and brush mattress of expensive construction as aforesaid, require to be placed in the works by the contractor the same number of square yards of another specified design of what is usually called a brush mattress of much cheaper cost comparatively to the contractor when placed in the works, and of very much less value to the United States, and that the description of the said design of mattress of cheaper cost to the contractor as aforesaid, should be so vaguely set forth in the specifications that the same could easily by a fraudulent and strained construction of said description be made to apparently cover the acceptance and approval by said engineer in charge as aforesaid, of large numbers of square yards of mattresses to be furnished by the contractor of a construction of brush mattresses of very much cheaper cost to the contractor furnishing the same, and of very much less value to the United States than would be the number of square yards of the log and brush mattresses of the other design of mattress which might under the specifications be called for by the engineer as aforesaid, and that said specifications should be so devised and drafted as aforesaid, by said Oberlin M. Carter in order that all persons not parties to said fraudulent scheme should be kept in ignorance until after the bids were all in, which design of mattress mentioned in the specifications the

engineer in charge would require to be put in the works, and so that bidders not a party to said fraudulent scheme would be compelled to put in bids based on the design of mattress of the most expensive and costly construction mentioned in the specifications, while
20 the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter would be advised before the putting in and opening of bids that the said Oberlin M. Carter, engineer in charge, would, if they, or some one for them, were the successful bidder, only require to be put in the works under such contract, mattresses made on the very cheapest design, and that design construed by him in the superintending, approving and accepting of said works, most strongly against the United States and most liberally in favor of the contractor, with the intent that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or some one of them, or some person or corporation acting secretly for their benefit, would always be the successful bidders for such contract work, at the very lowest cost to the contractor and at the very highest cost to the United States for the material put in consistent with keeping the fraud concealed; and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should with fraudulent intent so devise and draft the specifications of contracts for jetty works, training walls and river and harbor improvements to be from time to time let by the United States in said district through him, as to require from the successful bidder for such contract work, the furnishing at one price per unit, of work and material of several types of such work and material largely varying in cost to the contractor, and reserving by the provisions of the specifications the option to the said engineer officer in charge, the determination after the letting of the contract which type of such work and material should be used, but that said Oberlin M. Carter, engineer in charge, would prior to the time of opening bids for such contract work
21 secretly inform the said other parties to said fraudulent scheme that he would only require the cheapest type of such material and work to be put in under such contract with intent to fraudulently enable the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or some of them, or some person or corporation for their benefit, to obtain such contract at the least cost to themselves and greatest cost to the United States for the value of the work and material furnished, and with the fraudulent intent that if the successful bidder should be some person not a party to said fraudulent scheme, the said engineer officer in charge would require from said contractor for such work, the furnishing of that type of such work and material specified in the contract most costly to the contractor, and that said engineer officer in charge, with fraudulent intent would in such case give the specifications such rigid and unfair construction against the interest of such contractor that the performance of such contract would be ruinous to such contractor and thus further competition with the said Benjamin D. Greene, John F. Gaynor, Wil-

liam T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter for the obtaining of similar contract work would be thereafter effectually shut off; and that the said Oberlin M. Carter, as such engineer officer of the United States, in charge of said Savannah district, with fraudulent intent, should in the actual construction of the work done under such contracts obtained by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or by one of them, or in the name of some person or corporation secretly for their benefit, so change the quantities and type of material and work required to be furnished by the contractor, from the quantities and type
22 of material and work used in the specifications to canvass for bids for such contracts, as would ensure the contractors the maximum profit in such contract work at the least cost to the contractors, even though such change should give the United States work and material of much less value to the United States; and that said Oberlin M. Carter, as such engineer officer of the United States, in charge of said Savannah district, should when some person other than the said parties to said fraudulent scheme was the lowest bidder at the letting of such contract work, and one of said conspirators, or some one for their benefit was a higher bidder for such contract work, recommend the rejection of such lowest bid for any slight defect in the proposal, while in similar instances when it should become necessary for said conspirators to put in at the last minute—a second bid to meet unanticipated competition at the letting of such contract work, said engineer officer would knowingly and corruptly approve for acceptance their proposals and guarantees known to him to be forgeries; and that said Oberlin M. Carter, as such engineer officer of the United States, in charge of said Savannah district, should knowingly and fraudulently approve for payment accounts which should be so fraudulently rendered to him, as such engineer officer in charge as aforesaid, by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or by some one of them, or by and in the name of the person or corporation, which should by the successful operation of such fraudulent scheme have obtained such contracts for the secret benefit of the said conspirators aforesaid, and which accounts should be so rendered as aforesaid, for such inferior work and material to be put in on such works as aforesaid, at the exorbitant and fraudulent prices stated in such contracts, so fraudulently
23 to be made by said Oberlin M. Carter, as such engineer officer in charge as aforesaid, with said conspirators, or some person or corporation for them as aforesaid; and that said Oberlin M. Carter as such engineer officer in charge of said Savannah district as aforesaid, would when in funds as a disbursing officer fraudulently pay over to the said conspirators, or to some one of them, or some person or corporation for their benefit, the amounts of money for which said accounts so rendered should be by said Oberlin M. Carter, as such engineer officer in charge, so approved, and that said conspirators should divide between them and appropriate to their own use said moneys so fraudulently to be obtained; and that said

fraudulent scheme contemplated that the said Benjamin D. Greene John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter would use some one or more or all of said means and devices aforesaid and such other and additional devices as might become necessary for the accomplishment of the general fraudulent design of the scheme hereinbefore set forth; and that on the said first day of January, in the year of our Lord eighteen hundred and ninety-seven, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter were proceeding with the construction of certain works in said eastern division of the southern district of Georgia under two contracts, which contracts had been prior to that time, to wit, on the eighth day of October, eighteen hundred and ninety-six, obtained by the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter for their secret benefit in the name of the Atlantic Contracting Company, a corporation organized in the year eighteen hundred and ninety-two, under the laws
24 of the State of West Virginia and of which corporation the said Benjamin D. Greene, John F. Gaynor, and William T. Gaynor held all the shares of stock at the date of its charter except stock of the par value of fifty dollars, and which contracts had been so obtained fraudulently from the United States by means of said fraudulent scheme and devices hereinbefore set forth through the said Oberlin M. Carter, engineer officer in charge of Savannah district, as aforesaid, and one of which said contracts was for the construction of jetties at Cumberland sound within the said eastern division of the southern district of Georgia, and the other of said contracts was for the construction of training walls and improving the harbor of Savannah within the said eastern division of the southern district of Georgia, and the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, on the first day of January, eighteen hundred and ninety-seven, in the said eastern division of the southern district of Georgia, then and there unlawfully, knowingly and feloniously amongst themselves and with said divers other persons to the grand jurors aforesaid unknown, did, band, conspire, confederate and agree together as aforesaid, to defraud the United States of said divers large sums of money hereinbefore mentioned by means of applying said fraudulent scheme in and to the execution and completion of the work under said contracts so made on the eighth day of October, eighteen hundred and ninety-six as aforesaid and in the obtaining of the money for the fraudulent accounts which should be rendered under said contracts to said Oberlin M. Carter, as such engineer officer as aforesaid and generally to carry such fraudulent scheme into execution in the obtaining of all contracts of like character which might thereafter be let in said Savannah district
25 by the United States through the said Oberlin M. Carter, as such engineer officer, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Deponent says his belief is based upon information contained in a true bill of indictment found by the grand jurors of the United States in and for the said southern district of Georgia, and brought into the court on the 8th day of December, 1899, a copy of which said indictment, duly certified by the clerk of the district court of the United States of America, for the southern district of Georgia, is hereto annexed and marked Exhibit "A," and made part of this deposition; that a bench warrant against Benjamin D. Greene was issued therefor on the 9th day of December, 1899, a duly certified copy of which is hereto annexed and marked Exhibit "B;" that a bench warrant against John F. Gaynor was issued therefor, on the 9th day of December, 1899, a certified copy of which is hereto annexed and marked Exhibit "C;" that a bench warrant against William T. Gaynor was issued therefor, on the 9th day of December, 1899, a duly certified copy of which is hereto annexed and marked Exhibit "D;" that a bench warrant against Edward H. Gaynor was issued therefor on the 9th day of December, 1899, a duly certified copy of which is hereto annexed and marked Exhibit "E."

Deponent says that he is informed and believes that the said defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor are now within the said southern district of New York.

CLARENCE S. HOUGHTON.

Sworn to before me this 13th day of December, 1899.

JNO. A. SHIELDS,
U. S. Com., S. D. of N. Y.

26 EXHIBIT A.

UNITED STATES OF AMERICA, }
Eastern Division, Southern District of Georgia, } *ss:*

I, H. H. King, clerk of the district court of the United States of America, for the southern district of Georgia, do hereby certify that the writing annexed to this certificate is a true copy of its respective original now on file and remaining on record in my office, to wit: Indictment No. 322, conspiracy, vio. secs. 5440–5438. R. S. United States *vs.* Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter.

In witness whereof I have caused the seal of the said court to be hereunto affixed, at the city of Savannah in the southern [SEAL.] district of Georgia, this eighth day of December in the year of our Lord, one thousand eight hundred and ninety-nine and of the Independence of the United States, the one hundred and twenty-fourth.

H. H. KING, *Clerk*,
Per S. F. B. GILLESPIE,
Deputy Clerk.

27 UNITED STATES OF AMERICA, }
Eastern Division, Southern District of Georgia. }

United States District Court, November Term, 1899.

The grand jurors of the United States chosen, selected, impaneled and sworn in and for the eastern division of the southern district of Georgia, upon their oaths present:

1st count.

That heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hund-er and ninety-seven, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, being evil-disposed persons, all late of said division and district, did, within said division and district and within the jurisdiction of this court, unlawfully, knowingly and feloniously amongst themselves and with divers other persons to the grand jurors aforesaid unknown, conspire, confederate and agree together to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter and which was then and there in process of execution by them: that said fraudulent scheme was first devised, concocted and put in operation in said southern district of Georgia by and between the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter on or about the year of our Lord one thousand eight hundred and ninety-one, and has been continuously in process of execution
28 in said southern district of Georgia by and between said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connelly and Oberlin M. Carter from about the said year eighteen hundred and ninety-one until on or about the first day of October in the year of our Lord eighteen hundred and ninety-nine.

That the said Oberlin M. Carter was an officer of the United States Army in the corps of engineers, and had been continuously from about the year of our Lord eighteen hundred and eighty-eight until about the twentieth day of July, in the year of our Lord eighteen hundred and ninety-seven, as such engineer officer, in local charge in said southern district of Georgia of what is usually called the "Savannah district" for the improvement by the United States of rivers and harbors, and as such officer he was engaged in and about the execution of such river and harbor improvements as were made in said Savannah district, within the southern judicial district of Georgia, during said period; and as such officer in charge of said Savannah district he was vested with sundry powers, duties and discretion during said period, and amongst other things, with power, duty and discretion in, proposing from time to time projects for the improvement of rivers and harbors in said district; with power, duty and discretion in devising and drafting from time to time specifications for contracts for the improvements proposed to be

made in said district; and with power, duty and discretion in, from time to time drafting and suggesting forms of advertisements for giving notice to the public that competitive bids would be received by him for the construction of such proposed works; and with power, duty and large discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids; and with power, duty and discretion in suggesting and causing to be fixed and fixing the time, designated in specifications for contracts, within which the successful bidder
29 would be required to commence work; and with power, duty and discretion in giving out information in regard to such contracts to be let; and with power, duty and discretion in receiving proposals for and recommending the awarding of such contracts; and with power, duty and discretion in approving or rejecting the bonds required to be given by such contractors; and with power, duty and discretion in superintending the work to be done by such contractors in said district, and of approving and accepting or rejecting the work done by such contractors, according as the same was in accordance with the requirements of such contracts or not; and with power, duty and discretion in suggesting and approving modifications of such contracts; and with power, duty and discretion in approving or rejecting the accounts rendered to him by such contractors for work done or claimed by such contractors to be done by them, according as said accounts should be fair and honest, or false and fraudulent; and when in funds as a disbursing officer he was vested with power, duty and discretion in paying such contractors or refusing to pay such contractors the amounts claimed by them to be due them for work done according as such claims were honest and fair, or false and fraudulent.

That the said fraudulent scheme contemplated; that the said Oberlin M. Carter, should, as such engineer officer of the United States so in charge of said Savannah district, so fraudulently exercise the said powers of his office and the said discretion so vested in him, that competition in the bidding for such contracts to be let for the United States through him should be cut off, and that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, in the name of some one of them, or of some other person or corpo-
30 ration for their benefit, would be the only real bidders for such contract work in said district, and that all contracts which were from time to time let for the improvements of the rivers and harbors in said Savannah district would be obtained by some one or other of said conspirators, or by and in the name of some other person or corporation, but secretly for the benefit of said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, and so that the said works in said district put out to be done for the United States on contracts would be let at high and exorbitant cost to the United States of America; and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should with fraudulent intent so devise and draft the

specifications of contracts for constructing jetty works and training walls to be from time to time let by the United States in said district through him, as to provide that the engineer in charge as aforesaid, might at his option require to be put in the work by the contractor a large number of square yards of one specified design of what is usually called a log and brush mattress, to be paid for by the United States to the contractor by the square yard, which design of mattress if so required to be put in by the engineer would make the cost of the fulfilling of the contract comparatively very great and expensive to the contractor, and which specifications should further provide that the engineer in charge as aforesaid, might at his option, and at the same price per square yard to be paid by the United States to the contractor, in lieu of the use of said design of log and brush mattress of expensive construction as aforesaid, require to be placed in the works by the contractor the same number of square yards of another specified design of what is usually called a brush mattress of much cheaper cost comparatively to the contractor
31 when placed in the works, and of very much less value to the United States, and that the description of the said design of mattress of cheaper cost to the contractor as aforesaid, should be so vaguely set forth in the specifications that the same could easily by a fraudulent and strained construction of said description be made to apparently cover the acceptance and approved by said engineer in charge as aforesaid, of large numbers of square yards of mattresses to be furnished by the contractor of a construction of brush mattresses of very much cheaper cost to the contractor furnishing the same, and of very much less value to the United States than would be the same number of square yards of the log and brush mattresses of the other design of mattress which might under the specifications be called for by the engineer as aforesaid, and that said specifications should be so devised and drafted as aforesaid, by said Oberlin M. Carter in order that all persons not parties to said fraudulent scheme should be kept in ignorance until after the bids were all in, which design of mattress mentioned in the specifications the engineer in charge would require to be put in the works, and so that bidders not a party to said fraudulent scheme would be compelled to put in bids based on the design of mattress of the most expensive and costly construction mentioned in the specifications, while the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter would be advised before the putting in and opening of bids that the said Oberlin M. Carter, engineer in charge, would, if they, or some one for them, were the successful bidder, only require to be put in the works under such contract, mattresses made on the very cheapest design, and that design construed by him in the superintending, approving and accepting of said
32 works, most strongly against the United States and most liberally in favor of the contractor, with the intent that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or some one of them, or some person or corporation acting secretly for

their benefit, would always be the successful bidders for such contract work at the very lowest cost to the contractor and at the very highest cost to the United States for the material put in consistent with keeping the fraud concealed; and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should with fraudulent intent so devise and draft the specifications of contracts for jetty works, training walls and river and harbor improvements to be from time to time let by the United States in said district through him, as to require from the successful bidder for such contract work, the furnishing at one price per unit, of work and material of several types of such work and material largely varying in cost to the contractor, and reserving by the provisions of the specifications the option to the said engineer officer in charge, the determination after the letting of the contract which type of such work and material should be used, but that said Oberlin M. Carter, engineer in charge, would prior to the time of opening bids for such contract work secretly inform the said other parties to said fraudulent scheme that he would only require the cheapest type of such material and work to be put in under such contract with intent to fraudulently enable the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or some of them, or some person or corporation for their benefit, to obtain such contract at the least cost to themselves and greatest cost to the United States for the value of the work and material
33 furnished, and with the fraudulent intent that if the successful bidder should be some person not a party to said fraudulent scheme, the said engineer officer in charge would require from said contractor for such work, the furnishing of that type of such work and material specified in the contract most costly to the contractor, and that said engineer officer in charge, with fraudulent intent would in such case give the specifications such rigid and unfair construction against the interest of such contractor that the performance of such contract would be ruinous to such contractor and thus further competition with the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter for the obtaining of similar contract work would be thereafter effectually shut off; and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, with fraudulent intent, should in the actual construction of the work done under such contracts obtained by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or by one of them, or in the name of some person or corporation, secretly for their benefit, so change the quantities and type of material and work required to be furnished by the contractor, from the quantities and type of material and work used in the specifications to canvass for bids for such contracts, as would ensure the contractors the maximum profit in such contract work at the least cost to the contractors, even though such change should give the United States work and material of much less value to the United States.

And that said Oberlin M. Carter as such engineer officer of the United States in charge of said Savannah district, should, when some person other than the said parties to said fraudulent
34 scheme was the lowest bidder at the letting of such contract work, and one of said conspirators, or some one for their benefit, was a higher bidder for such contract work, recommend the rejection of such lowest bid for any slight defect in the proposal, while in similar instances when it should become necessary for said conspirators to put in at the last minute, a second bid to meet unanticipated competition at the letting of such contract work, said engineer officer would knowingly and corruptly approve for acceptance their proposals and guarantees known to him to be forgeries; and that said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should knowingly and fraudulently approve for payment accounts which should be so fraudulently rendered to him, as such engineer officer in charge as aforesaid, by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or by some one of them, or by and in the name of the person or corporation, which should by the successful operation of such fraudulent scheme have obtained such contracts for the secret benefit of the said conspirators aforesaid, and which accounts should be so rendered as aforesaid, for such inferior work and material to be put in on such works as aforesaid, at the exorbitant and fraudulent prices stated in such contracts, so fraudulently to be made by said Oberlin M. Carter, as such engineer officer in charge as aforesaid, with said conspirators, or some person or corporation for them as aforesaid; and that said Oberlin M. Carter as such engineer officer in charge of said Savannah district as aforesaid, would when in funds as a disbursing officer fraudulently pay over to the said conspirators, or to some one of them, or some person or corporation for their benefit, the amounts of money for which said accounts so rendered should be by said Oberlin M. Carter as such engineer officer in charge so approved, and that said conspira-
35 tors should divide between them and appropriate to their own use said moneys so fraudulently to be obtained; and that said fraudulent scheme contemplated that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter would use some one or more or all of said means and devises aforesaid and such other and additional devises as might become necessary for the accomplishment of the general fraudulent design of the scheme hereinbefore set forth;

And that on the said first day of January, in the year of our Lord eighteen hundred and ninety-seven, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter were proceeding with the construction of certain works in said eastern division of the southern district of Georgia, under two contracts which contracts had been prior to that time, to wit, on the eighth day of October, eighteen hundred and ninety-six, obtained by the said Benjamin D.

Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter for their secret benefit in the name of the Atlantic Contracting Company, a corporation organized in the year eighteen hundred and ninety-two, under the laws of the State of West Virginia and of which corporation the said Benjamin D. Greene, John F. Gaynor and William T. Gaynor held all the shares of stock at the date of its charter except stock of the par value of fifty dollars, and which contracts had been so obtained fraudulently from the United States by means of said fraudulent scheme and devices hereinbefore set forth through the said Oberlin M. Carter, engineer officer in charge of Savannah district as aforesaid, and one of which said contracts was for the construction of jetties at Cumberland sound within the said eastern
36 division of the southern district of Georgia, and the other of said contracts was for the construction of training walls and improving the harbor of Savannah within the said eastern division of the southern district of Georgia, and the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, on the said first day of January, eighteen hundred and ninety-seven, in the said eastern division of the southern district of Georgia, then and there unlawfully, knowingly and feloniously amongst themselves and with said divers other persons to the grand jurors aforesaid unknown, did, band, conspire, confederate and agree together as aforesaid, to defraud the United States of said divers large sums of money hereinafter mentioned by means of applying said fraudulent scheme in and to the execution and completion of the work under said contracts so made on the 8th day of October, eighteen hundred and ninety-six, as aforesaid, and in the obtaining of the money for the fraudulent accounts which should be rendered under said contracts to said Oberlin M. Carter, as such engineer officer as aforesaid, and generally to carry said fraudulent scheme into execution in the obtaining of all contracts of like character which might thereafter be let in said Savannah district by the United States through the said Oberlin M. Carter, as such engineer officer, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

2d count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in pursuance of said conspiracy in the above count of this indictment set forth, the said Michael A. Connally did within the said eastern division of the southe[illegible]t of Georgia
and within the jurisdiction of said court, afterwards, to wit,
37 on the seventeenth day of March, A. D. 1897, then and there assist the said Oberlin M. Carter in the preparation of a certain document purporting to be articles of agreement entered into on the seventeenth day of March, A. D. 1897, between Oberlin M. Carter, corps of engineers, U. S. Army, of the first part, and the Atlantic Contracting Company, of New York, city of N. Y., of the second part, and which purports to modify the contract entered into by

and between the Atlantic Contracting Company and said Oberlin M. Carter, captain corps of engineers, for the United States, made on the eighth day of October, A. D. 1896, for work at the entrance of Cumberland sound, Georgia, which contract is mentioned in the above preceding count of this indictment, and which document, so made on the seventeenth day of March, A. D. 1897, as aforesaid, purports to be signed by O. M. Carter, captain corps of eng'n'rs, U. S. A., and by the Atlantic Contracting Co., John F. Gaynor, president, and by William T. Gaynor, secretary, and upon which the name of said Michael A. Connally appears as a witness, and he, the said Michael A. Connally, did then and there forge the name of said William T. Gaynor, secretary, so purporting to be signed to said document; and he, the said Michael A. Connally, did likewise then and there assist the said Oberlin M. Carter in the preparation of a document purporting to be dated the eighteenth day of March, A. D. 1897, and purporting to be the written consent of Anson M. Bangs and Eugene Hughes to the modified agreement dated March 17, 1897, above described; and he, the said Michael A. Connally, did then and there forge the said signatures of Anson M. Bangs and Eugene Hughes signed to said document purporting to be such assent of said sureties, and did then and there forge the signatures of James C. Bogart and
38 Henry Smith, which signatures purport to be signed on said document as witnessing the signatures of said Anson M. Bangs and Eugene Hughes to said document; and that he, the said Oberlin M. Carter, did then and there knowingly cause said forged documents to be then and there forwarded to the War Department of the United States for approval, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

3d count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in pursuance of said conspiracy in the first count of this indictment mentioned, within said eastern division of the southern district of Georgia, and within the jurisdiction of this court, afterwards, to wit, on the first day of July, in the year of our Lord eighteen hundred and ninety-seven, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter did cause to be presented to the said Oberlin M. Carter, then and there an officer in the military service of the United States, to wit, captain in the corps of engineers in charge of the Savannah district aforesaid, for approval a certain claim against the United States, they, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, then and there well knowing said claim to be fraudulent, and which said claim was then and there in the words and figures following, to wit:

"SAVANNAH, GA., *July* 1, 1897.

The United States engineer department to the Atlantic Contracting Company, Dr.

To labor and material furnished during the month of January, 1897, under formal written contract dated October 8, 1896, on work of improving harbor at Savannah, Georgia, as follows:

31,724.23 square yards of brush mattresses at $0.95.....	$30,138.02
2,297.86 cubic yards of fourth-class stone at $2.75.....	6,319.11
	36,457.13
Less 10 per cent. retainer.....	3,645.71
Amount due.....	32,811.42

Submitted by

THE ATLANTIC CONTRACTING COMPANY,
By EDWARD H. GAYNOR, *Treasurer*."

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

4th count.

And the grand jurors, aforesaid, upon their oaths aforesaid, do further present that in pursuance of said conspiracy in the first count of this indictment mentioned, afterwards, to wit, on the sixth day of July, in the year of our Lord eighteen hundred and ninety-seven, in the southern district of the State of New York and within the jurisdiction of this court, the said Oberlin M. Carter, as such engineer officer in charge of the Savannah district, as aforesaid, did then and there issue to the said Atlantic Contracting Company a certain check signed by said Oberlin M. Carter as captain corps of engineers, United States Army, drawn on the assistant treasurer of the United States, New York, and payable to the order of the Atlantic Contracting Company, for the sum of three hundred and forty-five thousand dollars for contract work improving Cumberland sound, Georgia, and did then and there deliver the said check to the said John F. Gaynor in payment of a claim of the said Atlantic Contracting Company for the sum of three hundred and forty-five thousand dollars for work claimed to have been done by the said Atlantic Contracting Company in the improvement of Cumberland sound under said contract of October 8, 1896, in the first count of this indictment mentioned, which claim he the said Oberlin M. Carter, then and there knew to be fraudulent, and which said check was then and there in the words and figures following, to wit:

"WAR U. S. ENG'R, OFFICE ENGINEERS,
SAVANNAH, GA., *July* 6, 1897.

No. 270,537.

C. Assistant treasurer of the U. S., New York,

Pay to the order of the Atlantic Contracting Co. three hundred and forty-five thousand $\frac{00}{100}$ dollars.
$345,000.00.

O. M. CARTER,
Capt. Corps of Eng'r- U. S. A., Engineer U. S. A.

State object for
which drawn.
Contract work.
Improving
Cumberland sound, Ga.

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

5th count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in pursuance of said conspiracy in the first count of this indictment mentioned, afterwards, to wit, on the sixth day of July, in the year of our Lord eighteen hundred and ninety-
41 seven, in the southern district of the State of New York, and within the jurisdiction of this court, the said Oberlin M. Carter, as such engineer officer in charge of the Savannah district, as aforesaid, did then and there issue to the said Atlantic Contracting Company a certain check signed by said Oberlin M. Carter, as captain corps of engineers, United States Army, drawn on the assistant treasurer of the United States, New York, and payable to the order of the Atlantic Contracting Company, for the sum of two hundred and thirty thousand seven hundred and forty-nine dollars and ninety cents for contract work improving Savannah harbor, Georgia, and did then and there deliver the said check to the said John F. Gaynor in payment of a claim of the said Atlantic Contracting Company for the sum of two hundred and thirty thousand seven hundred and forty-nine dollars and ninety cents for work claimed to have been done by the said Atlantic Contracting Company in the improvement of Savannah harbor, Georgia, under said contract of October 8, 1896, in the first count of this indictment mentioned, which claim he, the said Oberlin M. Carter, then and there knew to be fraudulent, and which said check was then and there in the words and figures following, to wit.

WAR U. S. ENG'R OFFICE ENGINEERS,
SAVANNAH, GA., *July* 6, 1897.

No. 270,536.

B. Assistant treasurer of the U. S., New York,

Pay to the order of the Atlantic Contracting Co. two hundred and thirty thousand seven hundred and forty-nine $\frac{90}{100}$ dollars.
$230,749.90. O. M. CARTER,
Capt. Corps of Eng., U. S. A., Engineer U. S. A.

42 State object for which drawn
Contract work
Improving
Savannah harbor Ga.

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

6th count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that on the said first day of January, in the year of our Lord one thousand eight hundred and ninety-seven, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, being evil-disposed persons, all late of said division and district, did within said division and district and within the jurisdiction of this court, unlawfully, knowingly and feloniously amongst themselves and with divers other persons to the grand jurors aforesaid unknown, band, conspire, confederate and agree together to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter; that the said Oberlin M. Carter, was on the day and year aforesaid, an officer of the United States Army in the corps of engineers and was then and there, as such engineer officer, in local charge in said southern district of Georgia of what is usually called the Savannah district for the improvement by the United States of rivers and harbors, and as such officer he was then and there engaged in and about the execution of such river and harbor improvements as were being made and to be made in said Savannah district, within the said
43 southern judicial district of Georgia, and as such engineer officer in charge of said Savannah district as aforesaid, he was vested with the usual powers, duties and discretion of engineer officers of the United States in charge of river and harbor improvement districts; and that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter then and there did band, conspire, confederate and agree together as aforesaid that the said Oberlin M. Carter, as such engineer officer of the United States so in charge of

said Savannah district, should so fraudulently exercise said powers, duties and discretion of the said office of engineer in charge of said district, that the competition provided for by law in the bidding for such contracts to be let for the United States through said engineer officer for the construction of the public improvements of the United States in the said Savannah district should be cut off, and that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, in the name of some one of them, or of some other person or corporation for their benefit, would be the only real bidders for such contract work in said district and that all such contracts which were from time to time let for the improvements of the rivers and harbors of said Savannah district would be so fraudulently and corruptly obtained by some one or other of said conspirators, or by and in the name of some other person or corporation, but secretly for the benefit of said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, at high and exorbitant cost to the United States for the work to be done and material to be furnished; and that the said Oberlin M. Carter would so devise, suggest and inaugurate projects for
44 the improvements of the rivers and harbors in said district and so devise and draft the specifications for work and contracts to be let for such improvements and so superintend the execution of such works, contracts for which should have been obtained by the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or by some one of them, or in the name of some other person or corporation secretly for their benefit, that large amounts of unnecessary and useless work should fraudulently be undertaken and done under such contracts for the United States by such contractors on such contracts; and that in the execution of all contracts for improvements made in said district for the United States through the said Oberlin M. Carter, as such officer in charge, he, the said Oberlin M. Carter, as such engineer officer in charge, would exercise the powers, duties and discretion of his office fraudulently and corruptly in favor of the contractor on such of said contracts as might be so obtained by the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or by some one of them, or other person or corporation for their secret benefit as aforesaid; and that the said Oberlin M. Carter would so falsely and fraudulently exercise the powers, duties and discretion of his office in the approval and acceptance of the work so fraudulently done under such contracts, so let and executed for the said public works so constructed by the Government of the United States in said district under and through the said Oberlin M. Carter as engineer officer in charge, that said contractors would receive payment for the construction of such works under such contract at high and exorbitant rates for the poorest and cheapest class of material and work put in under said contracts at least cost to such contractors, contrary to the form of the statute in such case
45 made and provided and against the peace and dignity of the said United States.

7th count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in pursuance of said conspiracy in the last preceding count of this indictment set forth, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, afterwards, to wit, on the first day of July in the year of our Lord eighteen hundred and ninety-seven, within said division and district, did then and there knowingly, wilfully and feloniously cause to be presented to the said Oberlin M. Carter then and there as such engineer officer in charge of said Savannah district for approval and payment, a claim against the Government of the United States for the sum of three hundred and forty-five thousand dollars, for labor, material and supplies so claimed to have been furnished the United States of America during the months of December, 1898, January, 1897, February, 1897, March, 1897, April, 1897, May, 1897, and June, 1897, on work of improving Cumberland sound, Georgia, within said southern district of Georgia, under a formal written contract, dated October 8, 1896, they, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, then and there well knowing said claim to be fraudulent, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

8th count.

And the grand jurors aforesaid, upon their oath- aforesaid, do further present that in pursuance of said conspiracy, in the
46 last but one preceding count in this indictment, mentioned, afterwards to wit, on the sixth day of July, in the year of our Lord eighteen hundred and ninety-seven, in the southern district of the State of New York and within the jurisdiction of this court, the said Oberlin M. Carter, as such engineer officer in charge of the Savannah district as aforesaid, did then and there issue to the said Atlantic Contracting Company a certain check signed by said Oberlin M. Carter as captain of engineers, United States Army, drawn on the assistant treasurer of the United States, New York, and payable to the order of the Atlantic Contracting Company, for the sum of three hundred and forty-five thousand dollars for contract work improving Cumberland sound, Georgia, and did then and there deliver the said check to the said John F. Gaynor in payment of a claim of the said Atlantic Contracting Company for the sum of three hundred and forty-five thousand dollars for work claimed to have been done by the said Atlantic Contracting Company in the improvement of Cumberland sound under said contract of October 8, 1896, in the last preceding count of this indictment mentioned, which claim he, the said Oberlin M. Carter, then and there knew to be fraudulent and which said check was then and there in the words and figures following, to wit:

"WAR U. S. ENG'R, OFFICE ENGINEERS,
SAVANNAH, GA., *July* 6, 1897.

No. 270,537.

C. Assistant treasurer of the U. S., New York,

Pay to the order of the Atlantic Contracting Co. three hundred and forty-five thousand $^{00}_{100}$ dollars.

$345,000.00. O. M. CARTER,
Capt. Corps of Eng'r, U. S. A., Engineer U. S. A.

47 State object for which drawn.
Contract work
Improving
Cumberland sound, Ga.;"

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

9th count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that on the said first day of July, in the year of our Lord eighteen hundred and ninety-seven, within the eastern division of the southern district of Georgia and within the jurisdiction of this court, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, did then and there unlawfully, knowingly, wilfully and feloniously amongst themselves and with divers other persons to the grand jurors aforesaid unknown, combine, conspire, confederate and agree together to defraud the Government of the United States by obtaining the allowance and payment by the United States through the said Oberlin M. Carter, he, the said Oberlin M. Carter, being then and there a captain in the corps of engineers of the United States Army, and as such captain in the corps of engineers, being then and there engaged in the work of improving for the Government the rivers and harbors of what is usually known as the "Savannah district" for the improvement of rivers and harbors, and he, the said Oberlin M. Carter, being then and there in the military service of the United States, and as such captain in the corps of engineers, being then and there a disbursing officer of the United States, entrusted with the disbursement of money applicable to such
48 improvements in said Savannah district,—of a certain fraudulent claim, and which said fraudulent claim was then and there a claim for labor and material claimed to have been furnished by the Atlantic Contracting Company, a corporation chartered under the laws of the State of West Virginia, under a contract theretofore entered into on the 8th day of October, A. D. 1896, for improving Cumberland sound within the State of Georgia, and which contract had been entered into between the said Atlantic Contracting Company and the said Oberlin M. Carter, as captain on the corps of engineers of the United States as aforesaid, and which said

fraudulent claim was for the sum of three hundred and forty-five thousand dollars for work, labor and supplies claimed to have been furnished to the United States by said Atlantic Contracting Company for said work at Cumberland sound, during the months of December, 1896, January, 1897, February, 1897, March, 1897, April, 1897, May, 1897, and June, 1897.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, afterwards, to wit, on the first day of July, in the year of our Lord eighteen hundred and ninety-seven, in furtherance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves, had as aforesaid, did unlawfully and fraudulently cause to be presented to the said Oberlin M. Carter as such officer then and there in the military service of the United States as aforesaid, a certain claim against the Government of the United States, they, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, well knowing that said claim was fraudulent, for the purpose of obtaining the approval and payment of said claim by the said Oberlin M. Carter, as such captain
49 in the corps of engineers of the United States Army in charge of said Savannah district as aforesaid, and which said fraudulent claim was then and there in the words and figures following, to wit:

"SAVANNAH, GA., *July* 1, 1897.

The United States engineer department to the Atlantic Contracting Company, Dr.

To labor and material furnished during the month of December, 1896, on work of improving Cumberland sound, Georgia, under formal written contract dated October 8, 1896, as follows:

18,727.34 square yards of mattresses @ $1.10.....	$20,600.07
1,968.06 cubic yards of third-class stone @ $3.90.....	7,675.43
	28,275.50
Less 10 per cent retained.....	2,827.55
Amount due.....	25,447.95

Submitted by

THE ATLANTIC CONTRACTING COMPANY,
By EDWARD H. GAYNOR, *Treasurer*."

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

10th count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that on the said first day of July, in the year of our

Lord eighteen hundred and ninety-seven, within the eastern division of the southern district of Georgia and within the jurisdiction of this court, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and
50 Oberlin M. Carter, did then and there unlawfully, knowingly, wilfully and feloniously amongst themselves and with divers other persons to the grand jurors aforesaid unknown, combine, conspire, confederate and agree together to defraud the Government of the United States by obtaining the allowance and payment by the United States through the said Oberlin M. Carter, he, the said Oberlin M. Carter, being then and there a captain in the corps of engineers of the United States Army, and as such captain in the corps of engineers being then and there engaged in the work of improving for the Government the rivers and harbors of what is usually known as the Savannah district, for the improvement of rivers and harbors, and he, the said Oberlin M. Carter, being then and there in the military service of the United States and as such captain in the corps of engineers, being then and there a disbursing officer of the United States entrusted with the disbursement of money applicable to such improvements in said Savannah district, of a certain fraudulent claim, and which said fraudulent claim was then and there a claim for labor and material claimed to have been furnished by the Atlantic Contracting Company, a corporation chartered under the laws of the State of West Virginia, under a contract theretofore entered into on the 8th day of October, A. D. 1896, for improving harbor at Savannah, within the State of Georgia, and which contract had been entered into between the said Atlantic Contracting Company and the said Oberlin M. Carter, as captain in the corps of engineers of the United States as aforesaid, and which said fraudulent claim was for the sum of two hundred and thirty thousand seven hundred and forty-nine dollars and ninety cents for work, labor and supplies claimed to have been furnished to the United States by said Atlantic Contracting Company for said work at said harbor during the months of December, 1896, January, 1897,
51 February, 1897, March, 1897, April, 1897, May, 1897, and June, 1897.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, afterwards, to wit, on the first day of July, in the year of our Lord eighteen hundred and ninety-seven, in furtherance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid, did unlawfully and fraudulently cause to be presented to the said Oberlin M. Carter, as such officer then and there in the military service of the United States as aforesaid, a certain claim against the Government of the United States, they, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter well knowing that said claim was fraudulent, for the purpose of obtaining the approval and payment of said claim by the said Oberlin M. Carter, as such captain in the corps of en-

gineers of the United States Army, in charge of said Savannah district as aforesaid, and which said fraudulent claim was then and there in the words and figures following, to wit:

"SAVANNAH, GA., *July* 1, 1897.

The United States engineer department to the Atlantic Contracting Company, Dr.

To labor and material furnished during the month of February, 1897, under formal written contract, dated October 8, 1896, on work of improving harbor at Savannah, Georgia, as follows:

52	23,151.66 square yards of mattresses @ $0.95.....	$21,994.08
	1,544.99 cubic yards of fourth-class stone @ $2.75.	4,248.72
		26,242.80
	Less 10 per cent. retained.....	2.624.28
	Amount due.....	23,618.52

Submitted by

THE ATLANTIC CONTRACTING COMPANY,
10. By EDWARD H. GAYNOR, *Treasurer.*"

contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

MARION ERWIN,
United States District Attorney.

A true bill.
Dec. 8th, 1899.
THOMAS S. McKEY, *Foreman.*

Endorsed on back as follows:
No. 322. United States district court, eastern division, southern district of Ga. United States *vs.* Benjamin D. Greene, *et al.* 5440. R. S. 5438 R. S. Indictment for conspiracy, etc. Filed December 8th, 1899. S. F. B. Gillespie, deputy clerk, Marion Erwin, U. S. att'y.

EXHIBIT B.

UNITED STATES OF AMERICA, }
Eastern Division, Southern District of Georgia. }

The President of the United States to the marshal of the district of Georgia and for his deputies or any or either of them:

Whereas, at a district court of the United States of America, for the southern district of Georgia, held at the city of Savannah, within and for the southern district of Georgia aforesaid on the 8th
53 day of December, in the year of our Lord one thousand and eight hundred and ninety-nine, the grand jurors in and for the said southern district of Georgia brought into the said court a true bill of indictment against one Benjamin D. Greene, late of the south-

ern district of the State of Georgia, for having unlawfully conspired with Oberlin M. Carter and others to defraud the United States in and about the letting and execution of certain river and harbor improvements in the said division and district in violation of section 5440, R. S., and for having unlawfully conspired with the said Oberlin M. Carter and others to present certain fraudulent accounts aggregating five hundred and seventy-five thousand seven hundred and forty-nine and $\frac{90}{100}$ dollars to the said Oberlin M. Carter then and there a disbursing officer of the United States for approval and payment.

As by the said indictment, now remaining on file and of record in the said court may more fully appear, to which indictment the said Benjamin D. Greene has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said Benjamin D. Greene and bring his body before the said court at the United States court-room in the city of Savannah, to answer the indictment aforesaid, and to be further dealt with as the law directs.

Herein fail not.

Witness, the Honorable Emory Speer, judge of the district court of the United States at Savannah, this 9th day of December, in the year of our Lord one thousand eight hundred and ninety-nine, and in the 124th year of the Independence of the United States of America.

[SEAL.]

S. F. B. GILLESPIE,
Deputy Clerk.

54 (Endorsed on back as follows:)

No. 322. In the dist. court of the United States, for the southern district of Georgia. United States *vs.* Benjamin D. Greene, *et al.* Indictment. Charge, conspiracy, &c., sec. 5440, R. S. Bench warrant. Issued 9th day of December, 1899. Marion Erwin, U. S. dist. attorney.

EXHIBIT C.

UNITED STATES OF AMERICA,
Eastern Division, Southern District of Georgia.

The President of the United States to the marshal of the district of Georgia and for his deputies or any or either of them:

Whereas, at a district court of the United States of America, for the southern district of Georgia, held at the city of Savannah, within and for the southern district of Georgia aforesaid, on the 8th day of December, in the year of our Lord one thousand and eight hundred and ninety-nine, the grand jurors in and for the said southern district of Georgia brought into the said court a true bill of indictment against one John F. Gaynor, late of the southern district of the State of Georgia, for having unlawfully conspired with Oberlin M. Carter and others to defraud the United States in and about the etting and execution of certain river and harbor improvements in

the said division and district in violation of section 5440, R. S., and for having unlawfully conspired with the said Oberlin M. Carter and others to present certain fraudulent accounts aggregating five hundred and seventy-five thousand seven hundred and forty-nine and $\frac{20}{100}$ dollars to the said Oberlin M. Carter, then and there a disbursing officer of the United States, for approval and payment.

55 As by the said indictment, now remaining on file and of record in the said court may more fully appear to which indictment the said John F. Gaynor has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said John F. Gaynor and bring his body before the said court at the United States court-room in the city of Savannah, to answer the indictment aforesaid, and to be further dealt with as the law directs.

Herein fail not.

Witness, the Honorable Emory Speer, judge of the district court of the United States at Savannah, this 9th day of December, in the year of our Lord one thousand eight hundred and ninety-nine, and in the 124th year of the Independence of the United States of America.

[SEAL.]

S. F. B. GILLESPIE,
Deputy Clerk.

(Endorsed on back as follows:)

No. 322. In the dist. court of the United States for the southern district of Georgia. United States *vs.* John F. Gaynor, *et al.* Indictment. Charge, conspiracy, &c., sec. 5440, R. S. Bench warrant. Issued 9th day of December, 1899. Marion Erwin, U. S. dist. attorney.

56 EXHIBIT D.

UNITED STATES OF AMERICA,
Eastern Division, Southern District of Georgia.

The President of the United States to the marshal of the district of Georgia and for his deputies or any or either of them:

Whereas, at a district court of the United States of America, for the southern district of Georgia, held at the city of Savannah, within and for the southern district of Georgia aforesaid, on the 8th day of December, in the year of our Lord one thousand and eight hundred and ninety-nine, the grand jurors in and for the said southern district of Georgia brought into the said court a true bill of indictment against one William T. Gaynor, late of the southern district of the State of Georgia, for having unlawfully conspired with Oberlin M. Carter and others to defraud the United States in and about the letting and execution of certain river and harbor improvements in the said division and district in violation of section 5440, R. S., and for having unlawfully conspired with the said Oberlin M. Carter and others to present certain fraudulent accounts aggregating five hundred and seventy-five thousand seven hundred and forty-nine and $\frac{20}{100}$ dollars

to the said Oberlin M. Carter then and there a disbursing officer of the United States for approval and payment.

As by the said indictment, now remaining on file and of record in the said court may more fully appear to which indictment the said William T. Gaynor has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said William T. Gaynor and bring his body before the said court at
57 the United States court-room in the city of Savannah, to answer the indictment aforesaid, and to be further dealt with as the law directs.

Herein fail not.

Witness, the Honorable Emory Speer, judge of the district court of the United States at Savannah, this 9th day of Decem-
[SEAL.] ber, in the year of our Lord one thousand eight hundred and ninety-nine, and in the 124th year of the Independence of the United States of America.

S. F. B. GILLESPIE,
Deputy Clerk.

(Endorsed on back as follows:)

No. 322. In the dist. court of the United States, for the southern district of Georgia. United States *vs.* William T. Gaynor *et al.* Indictment. Charge, conspiracy, &c., sec. 5440, R. S. Bench warrant. Issued 9th day of December, 1899. Marion Erwin, U. S. dist. attorney.

EXHIBIT E.

UNITED STATES OF AMERICA, }
Eastern Division, Southern District of Georgia. }

The President of the United States to the marshal of the district of Georgia and for his deputies or any or either of them:

Whereas, at a district court of the United States of America, for the southern district of Georgia, held at the city of Savannah, within and for the southern district of Georgia aforesaid, on the 8th day of December, in the year of our Lord one thousand and eight hundred and ninety-nine, the grand jurors in and for the said southern district of Georgia brought into the said court a true bill of indictment against one Edward H. Gaynor, late of the southern district of the State of Georgia, for having unlawfully conspired with
58 Oberlin M. Carter and others to defraud the United States in and about the letting and execution of certain river and harbor improvements in the said division and district in violation of section 5440, R. S., and for having unlawfully conspired with the said Oberlin M. Carter and others to present certain fraudulent accounts aggregating five hundred and seventy-five thousand seven hundred and forty-nine and $\frac{90}{100}$ dollars to the said Oberlin M. Carter then and there a disbursing officer of the United States for approval and payment.

As by the said indictment, now remaining on file and of record

in the said court may more fully appear, to which indictment the said Edward H. Gaynor has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said Edward H. Gaynor and bring his body before the said court at the United States court-room in the city of Savannah, to answer the indictment aforesaid, and to be further dealt with as the law directs.

Herein fail not.

Witness, the Honorable Emory Speer, judge of the district court of the United States at Savannah, this 9th day of December, in the year of our Lord one thousand eight hundred and ninety-nine, and in the 124th year of the Independence of the United States of America.

[SEAL.]

S. F. B. GILLESPIE,
Deputy Clerk.

(Endorsed on back as follows:)

No. 322. In the dist. court of the United States, for the southern district of Georgia. United States *vs.* Edward H. Gaynor, *et al.* Indictment, charge, conspiracy, &c., sec. 5440, R. S. Bench warrant. Issued 9th day of December, 1899. Marion Erwin, U. S. dist. attorney.

59 EXHIBIT "A[1]." Referred to in Annexed Petition.

The President of the United States to the marshal of the United States for the southern district of New York and to his deputies or any or either of them:

Whereas, complaint on oath hath been made to me, charging that Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, being evil-disposed persons, did on or about the first day of January, 1897, at the southern district of Georgia, *did*, within said district, and within the jurisdiction of said court, unlawfully, knowingly and feloniously amongst themselves, and with divers other persons unknown, conspire, confederate and agree together to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, and which was then and there in process of execution by them:

That said fraudulent scheme was first devised, concocted and put in operation in said southern district of Georgia, by and between the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, on or about the year of our Lord one thousand eight hundred and ninety-one, and has been continuously in process of execution in said southern district of Georgia by and between said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter from about the said year eighteen

hundred and ninety-one until on or about the first day of October, in the year of our Lord eighteen hundred and ninety-nine:

That the said Oberlin M. Carter was an officer of the United States Army in the corps of engineers, and had been continuously
60 from about the year of our Lord eighteen hundred and eighty-eight until about the twentieth day of July, in the year of our Lord eighteen hundred and ninety-seven, as such engineer officer in local charge in said southern district of Georgia, of what is usually called the "Savannah district" for the improvement by the United States of rivers and harbors, and as such officer he was engaged in and about the execution of such river and harbor improvements as were made in said Savannah district, within the southern judicial district of Georgia, during said period; and as such officer in charge of said Savannah district he was vested with sundry powers, duties and discretion during said period, and amongst other things;—with power, duty and discretion, in proposing from time to time projects for the improvement of rivers and harbors in said district; with power, duty and discretion in devising and drafting from time to time specifications for contracts for the improvements proposed to be made in said district; and with power, duty and discretion in from time to time drafting and suggesting forms of advertisements for giving notice to the public that competitive bids would be received by him for the construction of such proposed works; and with power, duty and large discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids; and with power, duty and discretion in suggesting and causing to be fixed and fixing the time designated in specifications for contracts, within which the successful bidder would be required to commence work; and with power, duty and discretion in giving out information in regard to such contracts to be let; and with power, duty and discretion in receiving proposals for and recommending the awarding of such contracts; and with power, duty and discretion in approving or rejecting the bonds required to be given by such
61 contractors; and with power, duty and discretion in superintending the work to be done by such contractors in said district and of approving and accepting or of rejecting the work done by such contractors according as same was in accordance with the requirements of such contracts or not; and with power, duty and discretion in suggesting and approving modifications of such contracts; and with power, duty and discretion in approving or rejecting the accounts rendered to him by such contractors for work done or claimed by such contractors to be done by them, according as said accounts should be fair and honest, or false and fraudulent; and when in funds as a disbursing officer he was vested with power, duty and discretion in paying such contractors or refusing to pay such contractors the amounts claimed by them to be due them for work done according as such claims were honest and fair, or false and fraudulent:

That the said fraudulent scheme contemplated that the said Oberlin M. Carter, should, as such engineer officer of the United States so in charge of said Savannah district, so fraudulently exercise the said

powers of his office and the said discretion so vested in him, that competition in the bidding for such contracts to be let for the United States through him should be cut off, and that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, in the name of some one of them, or of some other person or corporation for their benefit, would be the only real bidders for such contract work in said district, and that all contracts which were from time to time let for the improvements of the rivers and harbors in said Savannah district would be obtained by some one or other of said conspirators, or by and in the name of some other person or corporation, but secretly
62 for the benefit of said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, and so that the said works in said district put out to be done for the United States on contracts would be let at high and exorbitant cost to the United States of America; and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should with fraudulent intent so devise and draft the specifications of contracts for constructing jetty works and training walls to be from time to time let by the United States in the said district through him, as to provide that the engineer in charge as aforesaid, might at his option require to be put in the work by the contractor a large number of square yards of one specified design of what is usually called a log and brush mattress, to be paid for by the United States to the contractor by the square yard, which design of mattress if so required to be put in by the engineer would make the cost of the fulfilling of the contract comparatively very great and expensive to the contractor, and which specifications should further provide that the engineer in charge as aforesaid, might at his option, and at the same price per square yard to be paid by the United States to the contractor, in lieu of the use of said design of log and brush mattress of expensive construction as aforesaid, require to be placed in the works by the contractor the same number of square yards of another specified design of what is usually called a brush mattress of much cheaper cost comparatively to the contractor when placed in the works, and of very much less value to the United States, and that the description of the said design of mattress of cheaper cost to the contractor as aforesaid, should be so vaguely set forth in the specifications that the same could easily by a fraudulent and strained construction of said description be made to ap-
63 parently cover the acceptance and approval by said engineer in charge as aforesaid, of large numbers of square yards of mattresses to be furnished by the contractor of a construction of brush mattresses of very much cheaper cost to the contractor furnishing the same, and of very much less value to the United States than would be the number of square yards of the log and brush mattresses of the other design of mattress which might under the specifications be called for by the engineer as aforesaid, and that said specifications should be so devised and drafted as aforesaid by said Oberlin M. Carter in order that all persons not parties to said

fraudulent scheme should be kept in ignorance until after the bids were all in, which design of mattress mentioned in the specifications the engineer in charge would require to be put in the works, and so that bidders not a party to said fraudulent scheme would be compelled to put in bids based on the design of mattress of the most expensive and costly construction mentioned in the specifications, while the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter would be advised before the putting in and opening of bids that the said Oberlin M. Carter, engineer in charge, would, if they, or some one for them, were the successful bidder, only require to be put in the works under such contract, mattresses made on the very cheapest design, and that design construed by him in the superintending, approving and accepting of said works, most strongly against the United States and most liberally in favor of the contractor, with the intent that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or some one of them, or some person or corporation acting secretly for their benefit, would always
64 be the successful bidders for such contract work, at the very lowest cost to the contractor and at the very highest cost to the United States for the material put in consistent with keeping the fraud concealed; and that the said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should with fraudulent intent so devise and draft the specifications of contracts for jetty works, training walls and river and harbor improvements to be from time to time let by the United States in said district through him, as to require from the successful bidder for such contract work, the furnishing at one price per unit, of work and material of several types of such work and material largely varying in cost to the contractor, and reserving by the provisions of the specifications the option to the said engineer officer in charge, the determination after the letting of the contract which type of such work and material should be used, but that said Oberlin M. Carter, engineer in charge, would prior to the time of opening bids for such contract work secretly inform the said other parties to said fraudulent scheme that he would only require the cheapest type of such material and work to be put in under such contract with intent to fraudulently enable the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or some of them, or some person or corporation for their benefit, to obtain such contract at the least cost to themselves and greatest cost to the United States for the value of the work and material furnished, and with the fraudulent intent that if the successful bidder should be some person not a party to said fraudulent scheme, the said engineer officer in charge, would require from said contractor for such work, the furnishing of that type of such work and material specified in the contract most costly to the contractor, and that said engineer officer in charge,
65 with fraudulent intent, would in such case give the specifications such rigid and unfair construction against the interest

of such contractor that the performance of such contract would be ruinous to such contractor and thus further competition with the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter for the obtaining of similar contract work would be thereafter effectually shut off; and that the said Oberlin M. Carter, as such engineer officer of the United States, in charge of said Savannah district with fraudulent intent, should in the actual construction of the work done under such contracts obtained by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or by one of them, or in the name of some person or corporation, secretly for their benefit, so change the quantities and type of material and work required to be furnished by the contractor, from the quantities and type of material and work used in the specifications to canvass for bids for such contracts, as would ensure the contractors the maximum profit in such contract work at the least cost to the contractors, even though such change should give the United States work and material of much less value to the United States; and that said Oberlin M. Carter, as such engineer officer of the United States in charge of said Savannah district, should when some person other than the said parties to said fraudulent scheme was the lowest bidder at the letting of such contract work, and one of said conspirators, or some one for their benefit, was a higher bidder for such contract work, recommend the rejection of such lowest bid for any slight defect in the proposal, while in similar instances when it should become necessary for said conspirators to put in at the last minute, a second bid to meet unanticipated
66 competition at the letting of such contract work, said engineer officer would knowingly and corruptly approve for acceptance their proposals and guarantees known to him to be forgeries; and that said Oberlin M. Carter, as such engineer officer of the United States, in charge of said Savannah district, should knowingly and fraudulently approve for payment accounts which should be so fraudulently rendered to him, as such engineer officer in charge as aforesaid, by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter, or by some one of them, or by and in the name of the person or corporation, which should by the successful operation of such fraudulent scheme have obtained such contracts for the secret benefit of the said conspirators aforesaid, and which accounts should be so rendered as aforesaid for such inferior work and material to be put in on such works as aforesaid, at the exorbitant and fraudulent prices stated in such contracts, so fraudulently to be made by said Oberlin M. Carter, as such engineer officer in charge as aforesaid, with said conspirators, or some person or corporation for them as aforesaid; and that said Oberlin M. Carter, as such engineer officer in charge of said Savannah district as aforesaid, would when in funds as a disbursing officer fraudulently pay over to the said conspirators, or to some one of them, or some person or corporation for their benefit, the amounts of money for which said accounts so rendered should be by said Oberlin M. Carter, as such engineer officer in

charge so approved, and that said conspirators should divide between them and appropriate to their own use said moneys so fraudulently to be obtained and that said fraudulent scheme contemplated that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter would use some one or more or all of said
67 means and devises aforesaid and such other and additional devices as might become necessary for the accomplishment of the general fraudulent design of the scheme hereinbefore set forth; and that on the said first day of January, in the year of our Lord eighteen hundred and ninety-seven, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter were proceeding with the construction of certain works in said eastern division of the southern district of Georgia under two contracts, which contracts had been prior to that time, to wit: on the eighth day of October, eighteen hundred and ninety-six, obtained by the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter for their secret benefit in the name of the Atlantic Contracting Company, a corporation organized in the year eighteen hundred and ninety-two, under the laws of the State of West Virginia and of which corporation the said Benjamin D. Greene, John F. Gaynor, and William T. Gaynor held all the shares of stock at the date of its charter except stock of the par value of fifty dollars, and which contracts had been so obtained fraudulently from the United States by means of said fraudulent scheme and devices hereinbefore set forth through the said Oberlin M. Carter, engineer officer in charge of Savannah district as aforesaid, and one of which said contracts was for the construction of jetties at Cumberland sound within the said eastern division of the southern district of Georgia, and the other of said contracts was for the construction of training walls and improving the harbor of Savannah within the said eastern division of the southern district of Georgia, and the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and
68 Oberlin M. Carter, on the said first day of January, eighteen hundred and ninety-seven, in the said eastern division of the southern district of Georgia, then and there unlawfully, knowingly and feloniously amongst themselves and with said divers other persons unknown, did band, conspire, confederate and agree together aforesaid, to defraud the United States of said divers large sums of money hereinbefore mentioned by means of applying said fraudulent scheme in and to the execution and completion of the work under said contracts so made on the eighth day of October, eighteen hundred and ninety-six, as aforesaid, and in the obtaining of the money for the fraudulent accounts which should be rendered under said contracts to said Oberlin M. Carter, as such engineer officer as aforesaid and generally to carry said fraudulent scheme into execution in the obtaining of all contracts of like character which might thereafter be let in said Savannah district by the United States through the said Oberlin M. Carter, as such engineer officer, con-

trary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

And it having been satisfactorily proven to me that the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor are now within the southern district of New York,

Now, therefore, you are hereby commanded, in the name of the President of the United States of America to apprehend the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor and bring their bodies forthwith before me, or some judge or justice of the United States, wherever in the State of New York they may be found, that they may then and there be dealt with according to law for the said offense.

Given under my hand and seal, this thirteenth day of De-
69 cember, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.]

JNO. A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

HENRY L. BURNETT,
U. S. Attorney.

(Endorsed on back.)

Circuit court of the United States, for the southern district of New York. The United States of America *vs.* Benjamin D. Greene, John F. Gaynor, Wm. T. Gaynor, Edward H. Gaynor. Warrant. Henry L. Burnett, U. S. attorney. 3129–3248.

The within-named accused Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor having been arrested and brought before me on the within warrant and the charges in the within warrant contained having been duly explained to each of said accused, and they being duly cautioned and informed of their rights in the matter, say that they demand an examination; and the said accused Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor are hereby committed to the custody of the United States marshal for the southern district of New York, to be brought before me for examination on the 23d day of December, 1899, at 10 o'clock a. m. of said day in default of $20,000 bail as to Benjamin D. Greene and John F. Gaynor and $10,000 bail as to William T. Gaynor and Edward H. Gaynor.

JNO. A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

To William Henkel, Esq., U. S. marshal.

70 Defendants Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor discharged on bail to await examination.

JNO. A. SHIELDS,
U. S. Commissioner.

New York, Dec. 14, 1899.

Attendance and examination adjourned by commissioner to Dec. 30th, 1899, at 10 o'clock a. m.
Dec. 23, 1899.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Jan'y 3, 1900, at 2 o'clock p. m.
Dec. 30, 1899.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Jan'y 4, 1900, at 2 o'clock p. m.
Jan'y 3, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Jan'y 16, 1900, at 10 o'clock a. m.
Jan'y 4, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Jan'y 17, 1900, at 10 o'clock a. m.
Jan'y 16, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Jan'y 18, 1900, at 11 o'clock a. m.
Jan'y 17, 1900.

JNO. A. SHIELDS, *U. S. Com.*

71 Attendance and further examination adjourned to Jan'y 19, 1900, at 10.30 a. m.
Jan'y 18, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Jan'y 24, 1900, at 10.30 o'clock a. m.
Jan'y 19, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Jan'y 25, 1900, at 9½ o'clock a. m.
Jan'y 24, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Jan'y 27th, at 10 o'clock a. m.
Jan'y 25, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Feb'y 1st, 1900, at 2 o'clock p. m.
Jan'y 27th, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Feb'y 2d, 1900, at 1½ o'clock p. m.
Feb'y 1st, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and further examination adjourned to Feb'y 3, 1900, at 10 o'clock a. m.
Feb. 1, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Attendance and examination adjourned to await decision of commissioner on motion to discharge.
Feb'y 3d, 1900.

JNO. A. SHIELDS, *U. S. Com.*

72 The accused Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, having been arrested and brought before me on the annexed warrant, and demanding an examination, and an examination having been had, and it appearing to me from the testimony offered that the identity of the said accused has been proven and that there is probable cause to believe the said accused guilty of the offence in the annexed warrant contained;

The said accused, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, are hereby committed for trial at the southern district of Georgia, being the district in which the offense charged is alleged to have been committed, and the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor are hereby committed to the custody of the U. S. marshal, for the southern district of New York until a warrant for their removal shall issue by the U. S. district judge for the southern district of New York, or they shall be otherwise dealt with according to law.
New York, February 20, 1900.

JNO. A. SHIELDS,
U. S. Com., S. D. of N. Y.

To Wm. Henkel, U. S. marshal:

The accused Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor discharged on bail.
Feb'y 20, 1900.

ADDISON BROWN,
U. S. Dist. Judge.

After hearing on exceptions and on application for order of removal, ordered that the matter be referred back to the commissioner for taking further competent testimony as offered by either party in accordance with the opinion filed herein.
June 26, 1900.

ADDISON BROWN.

73 EXHIBIT "B." Referred to in Annexed Petition.

UNITED STATES
vs.
BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, Edward H. Gaynor, Michael A. Connally, and Oberlin M. Carter.

Amended complaint for the removal of the defendants Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor to the district court of the United States for the southern district of Georgia.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Clarence S. Houghton, assistant United States attorney, in and for the southern district of New York, being duly sworn, says, on information and belief (in addition to his affidavit heretofore made in the above-entitled case, on the 13th day of December, 1899), that to effect the object of the conspiracy set forth in the first count of the indictment referred to in his said affidavit, the said Michael A. Connally, named in said indictment as one of the conspirators, at and within the said eastern division of the southern district of Georgia, to wit, on the 17th day of March, 1897, did then and there assist the said Oberlin M. Carter, another of the said conspirators, in the preparation of a certain document purporting to be articles of agreement entered into on the said 17th day of March, 1897, between the said Oberlin M. Carter, corps of engineers, U. S. Army, of the first part and the Atlantic Contracting Company, of New York, city of N. Y., of the second part, and which purports to modify the contract entered into by and between the Atlantic Contracting Company and the said Oberlin M. Carter, captain, corps of engineers, for the United States, made on the 8th day of October, A. D. 1896, for work at the entrance of Cumberland sound, Georgia, which contract is mentioned in the said first count of the said indictment, and which
74 document so made on the said 17th day of March, 1897, as aforesaid, purports to be signed by O. M. Carter, captain corps of engineers, U. S. A., and by the Atlantic Contracting Co., John F. Gaynor president, and by William T. Gaynor, secretary, and upon which the name of the said Michael A. Connally appears as a witness, and he the said Michael A. Connally did then and there forge the name of William T. Gaynor, secretary, so purporting to be signed to said document, and he, the said Michael A. Connally, did likewise then and there assist the said Oberlin M. Carter in the preparation of a document purporting to be dated the eighteenth day of March, A. D. 1897, and purporting to be the written consent of Anson M. Bangs and Eugene Hughes to the modified agreement dated March 17, 1897, above described, and he, the said Michael A. Connally, did then and there forge the said signature- of Anson M. Bangs and Eugene Hughes, signed to said document purporting to be such assent to said sureties, and did then and there forge the signatures of James

C. Bogart and Henry Smith, which signatures purport to be signed on said document as witnessing the signatures of said Anson M. Bangs and Eugene Hughes to said document, and that he, the said Oberlin M. Carter, did then and there knowingly cause said forged documents to be then and there forwarded to the War Department of the United States for approval, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. And deponent refers to the second count of the said indictment, where the said overt act is set forth fully and at large, for greater certainty; and deponent moreover refers to the third and fourth counts of the said indictment, and the overt acts therein set forth, and by way of describing the said overt acts and each of them, he adopts the language of the said third and
75 fourth counts in their descriptions of the said overt acts done as therein alleged, in pursuance of the conspiracy set forth in the first count of the said indictment; and he makes them and each of them parts of this affidavit.

And deponent further says, on information and belief that on the first day of July, in the year of our Lord one thousand eight hundred and ninety-seven, within the said eastern division of the southern district of Georgia, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter did then and there unlawfully, knowingly, wilfully and feloniously amongst themselves and with divers other persons to deponent unknown, combine, conspire, confederate and agree together to defraud the Government of the United States by obtaining the allowance and payment by the United States through the said Oberlin M. Carter—he, the said Oberlin M. Carter being then and there a captain in the corps of engineers of the United States Army, and as such captain in the corps of engineers, being then and there engaged in the work of improving for the Government the rivers and harbors of what is usually known as the Savannah district for the improvement of rivers and harbors, and he, the said Oberlin M. Carter being then and there in the military service of the United States and as such captain in the corps of engineers, being then and there a disbursing officer of the United States entrusted with the disbursement of money applicable to such improvements in said Savannah district—of a certain fraudulent claim, and which said fraudulent claim was then and there a claim for labor and material claimed to have been furnished by the Atlantic Contracting Company, a corporation chartered under the laws of the State of West Virginia, under a contract theretofore entered into on the 8th day of October, A. D. 1896, for improving Harbor Savannah, within the State of
76 Georgia, and which contract had been entered into between the said Atlantic Contracting Company and the said Oberlin M. Carter as captain of the corps of engineers of the United States, as aforesaid, and which said fraudulent claim was for the sum of two hundred and thirty thousand seven hundred and forty-nine dollars and ninety cents for work, labor and supplies claimed to have been furnished to the United States by said Atlantic Contract-

ing Company for said work at said harbor during the months of December, 1896, January, 1897, February, 1897, March, 1897, April, 1897, May, 1897, and June, 1897. And deponent further says, on information and belief, that to effect the object of the said conspiracy, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor Edward H. Gaynor Michael A. Connally and Oberlin M. Carter, afterwards to wit, on the first day of July, 1897, did unlawfully and fraudulently cause to be presented to the said Oberlin M. Carter as such officer then and there in the military service of the United States, as aforesaid, a certain claim against the Government of the United States, they, the said Benjamin D. Green, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connally and Oberlin M. Carter well knowing that such claim was fraudulent, for the purpose of obtaining the approval and payment of said claim, by the said Oberlin M. Carter as such captain in the corps of engineers of the United States Army in charge of said Savannah district, as aforesaid, and which said fraudulent claim was then and there in the words and figures following, to wit:

"SAVANNAH, GA., *July* 1, 1897.

The United States engineers department to the Atlantic Contracting Company, Dr.

77 To labor and material furnished during the month of February, 1897, under formal written contract dated October 8, 1896, on work of improving the harbor of Savannah, Georgia, as follows:

23,151.66 square yards of mattresses @ $0.95	$21,994.08
1,544.99 cubic yards of fourth-class stone @ $2.75	4,248.72
	$26,242.80
Less 10 per cent. retained	2,624.28
	$23,618.52

Submitted by

THE ATLANTIC CONTRACTING COMPANY,
By EDWARD H. GAYNOR, *Treasurer.*"

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

And deponent bases his belief as to the allegations of this affidavit, upon the certified copy of the said indictment, referred to in his affidavit of December 13, 1899, as aforesaid, and says that the said indictment consists of ten counts; and deponent refers to the same indictment, and each count thereof, for greater certainty, and adopts the same as part of this amended complaint, verily believing the allegations of the said indictment, as to the charges of conspiracy, set forth in the first, sixth, ninth and tenth counts and the allegations of overt acts set forth in the second, third, fourth, fifth, seventh, eighth, ninth and tenth counts thereof to be true. The said indict-

ment, marked Exhibit "A," and a duly certified copy of the
78 bench warrant issued in the said case, Exhibit "B" are attached to deponent's affidavit of Dec. 13, 1899, aforesaid.

CLARENCE S. HOUGHTON.

Sworn before me this 13th day of January, 1900.

JNO. A. SHIELDS, *U. S. Com.*

Endorsed on back as follows:

U. S. commissioner's court, southern district of New York. The United States *versus* Benjamin D. Greene and others. Amended complaint. Henry L. Burnett, United States attorney.

79 EXHIBIT "C." Referred to in the Annexed Petition.

United States District Court, Southern District of New York.

UNITED STATES
against
BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. Gaynor and Others.

Indictment—Removal—Section 1014 Rev. Stat.

Henry L. Burnett, Marion Erwin, United States district attorneys, and Ernest E. Baldwin, assistant attorney for the United States.

Abram J. Rose and L. Laflin Kellogg, for defendants.

BROWN, *J.:*

The above four defendants, with Michael A. Connally and Oberlin M. Carter, were indicted by the grand jury in the eastern division of the southern district of Georgia on December 8, 1899, for conspiring to defraud the United States under two contracts, one for improving the harbor at Savannah and the other for work in Cumberland sound. Upon an affidavit to this effect by one of the assistants of the United States attorney, referring to a certified copy of the indictment, a warrant was issued by a United States commissioner for this district, under section 1014 of the United States Re-
80 vised Statutes, for the apprehension of the four defendants above named.

The defendant Greene resides at Stamford, Conn.; John F. and W. T. Gaynor in Onondaga county, N. Y., and E. H. Gaynor at Boston, Mass. The defendants, on notice, appeared before the commissioner and demanded an examination, and proceedings thereon were from time to time had before the commissioner, who, upon finding probable cause that the offences charged had been committed, ordered the commitment of the defendants for trial. An order is now asked for their removal to the eastern district of Georgia for trial.

The stenographer's notes of the proceedings, returned by the commissioner, consisted of about 1,100 pages, showing, however, no other evidence of the commission of the offence than a certified copy of the indictment. Some evidence was given as to the identity of

the defendants as the persons charged, and this was not seriously contested. Aside from this and the arguments of counsel, the whole record consists of little except rulings upon the evidence on behalf of the defendants sought to be introduced, and numerous exhibits, all of which, so far as they pertained to the merits or tended to show the innocence of the accused and the want of probable cause, were rejected, mostly on the ground that the question of guilt or innocence should only be heard and determined upon a trial under the indictment.

81 Upon this record the defendants object to any order of removal on the ground,

First. That the indictment is bad upon its face.

Second. That it was not properly proved, since neither was the original indictment produced, nor was the copy, though certified by the deputy clerk, duly authenticated as an exemplified copy.

Third. That by reason of its vagueness, its lack of specification of facts and circumstances, and its inconsistencies and contradictions in different parts it is insufficient evidence of probable cause of guilt.

Fourth. That evidence was improperly rejected tending to show that the grand jury was illegally drawn and constituted, and the indictment, therefore, void. And

Fifth. That the defendants were virtually denied a hearing by the rejection of all evidence tending to show their innocence.

As respects procedure the present case is identical with that of *In re* Dana, (68 Fed., 886), in which this court upon careful consideration pointed out the course necessary to be pursued in cases of this character under section 1014 of the United States Revised Statutes, and under the law of this State thereby virtually adopted.

The views there expressed seem to have been approved by Lacombe, J., in Price's case (83 Fed., 830; 84 Fed., 636; affirmed 85 Fed., 84, 87), where the course indicated in the Dana case was followed

82 by the examination of several witnesses to show probable cause, as well as the production of an exemplified copy of the indictment. It was also approved in the case of *In re* Wood (95 Fed., 288), and so far as I am aware it has not been disapproved in any subsequent reported case.

In view of these decisions which were repeatedly called to the commissioner's attention, I find it difficult to understand the disregard of them in the rejection of the great mass of competent evidence and exhibits offered in the defendant's behalf. In that decision it was pointed out that the proceeding for commitment and removal under section 1014 is an original proceeding, to be conducted according to the laws of the State in similar proceedings before committing magistrates; that the object of the proceeding is to enable the commissioner to ascertain for himself whether from the proof of facts and circumstances produced before him, there is probable cause to believe the defendants guilty of the offence charged; that the mode of proceeding in such cases is precisely the same whether there is an indictment or no indictment (see also

Price *v.* McCarthy, 89 Fed., 84, per Wallace, C. J.); and that an indictment, when offered by the prosecution, is at best but evidence, in no way conclusive, and in truth is but secondary evidence (which to a certain extent is admissible on such examinations), and that although the copy of an indictment may be treated as an affidavit,

83 it is, nevertheless, to be judged by the same rules as other affidavits, and given weight only according to the nature and character of its averments and the facts and circumstances which it sets forth, if any, in a manner sufficient to warrant the conclusion of probable cause to believe the accused guilty.

By a singular inversion, however, the best reason for the admission of the defendants' proposed evidence, namely, its tendency to show innocence of the charge and the lack of probable cause, was in this instance made the reason for excluding it. A certified copy of the indictment having been received by the commissioner, it was thereupon contended by the prosecution, and virtually ruled by the commissioner, that the evidence was closed as respects the question of guilt, and that no evidence disproving it could be allowed, since that would be "trying the issue" here instead of in Georgia. Thus, although the right to show want of probable cause was admitted in form it was in substance denied; since whatever would disprove the alleged offence was for that very reason excluded.

Precisely opposite was the ruling of this court in the Dana case, where it was shown, as I have said, that by section 1014 (the sole authority in the Federal courts for commitment or removal in such cases) the proceeding before commissioners must be in conformity with the existing State procedure. Mr. Justice Curtis, in United States *v.* Rundlett, (2 Curtis, 41), says:

84 "My opinion is that it was the intention of Congress by these words to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the State where the proceedings should take place * * * the prisoner is not only to be arrested and imprisoned but bailed agreeable to the usual mode of process in the State."

See also U. S. *v.* Horton's Securities, 2 Dillon, 94.

Mr. Justice Miller and other eminent judges have confirmed this interpretation.

See *in re* Dana, 86 Fed., 893–894, and cases *ante*.

In States, therefore, where the accused has no right to examine witnesses on his own behalf before a committing magistrate he cannot do so in proceedings under section 1014; but in other States, as in New York, where this right does exist and is in daily practice, it cannot be lawfully denied him.

In New York the right of the accused to produce witnesses on his own behalf before committing magistrates was confirmed by express statute more than seventy years ago; and more than forty years before the enactment of section 1014 of the United States Revised Statutes; and such is the uniform course of procedure. The New York Revised Statutes (1828) declare (vol. 2, p. 708):

"After the examination of the prisoner is completed, his wit-

nesses, if he shall have any, shall be sworn and examined, and he may have the assistance of counsel in such examination."

85 This practice is ancient.

Dallon's Jus. (1742), ch. 165; 1 Chit. Cr. L., 79.

The existence of an indictment in another jurisdiction has no bearing upon the application of this statute to proceedings for commitment, or to the course of the examination when an examination is demanded pursuant to the statute, nor upon the commissioner's duty to take whatever competent evidence is offered by the defendant tending to show the want of probable cause, and for that purpose and to that extent the proceeding is, of necessity, like the proceedings before the State magistrates, a partial preliminary hearing on the merits.

It is urged that under section 1014 the similitude to State proceedings may be preserved by treating a Federal indictment from another district as a State indictment found in one county is treated in another county wherein the defendant is arrested.

That analogy, however, could only be followed by the endorsement of a bench warrant from the Federal district where the indictment was had by the judge of the district where the accused might be found. But that practice, if ever in use, has been long since abandoned. Besides the authorities opposed to it cited in the Dana case (68 Fed., 893–894), it was again disapproved by Lacombe, J., in the late case of Price (83 Fed., 830), as oppressive and un-

86 authorized. Section 1014 moreover, plainly contemplates the examination of witnesses and provides for a return of the "recognizances" for their appearance to testify in the case. In proceeding under that statute, therefore, the commissioner must receive all evidence touching probable cause of guilt that a State committing magistrate would be bound to take, without reference to any subsequent trial upon indictment.

The objection that this would be "trying the issue" is premature. There is no "issue" as respects the indictment until the defendants are committed, removed and arraigned and plead not guilty. The inquiry before the commissioner is for the very purpose of ascertaining whether there is sufficient ground to commit and remove the accused and oblige him to plead and stand trial, and to enable him under the State statute to arrest the proceedings *in limine*, if he can, by proving that there is no probable cause for the accusation. That was the only "issue" before the commissioner on this hearing.

In New York the statute above cited has been followed in the Code of Criminal Procedure by still further provisions designed to safeguard accused persons, from arbitrary, mistaken or malicious commitments. (188–214.) And in the absence of some act of Congress expressly dispensing with any other evidence than the indictment itself, as in extradition proceedings, it is impossible that in a proceeding under section 1014 which makes applicable the State laws, the rights of citizens expressly guarded by the State

87 laws can be set aside by a mere indictment in a distant jurisdiction, so that without a word in their own defense citizens

could be thereupon *be* transported for trial hundreds or even thousands of miles away from their homes, in contravention of the act of Congress and the laws of the States, which it recognizes and adopts. Such a proceeding would be not merely erroneous, but illegal.

The extradition cases cited on the argument, whether interstate or international, are wholly inapplicable. Both those proceedings are regulated by wholly different statutes or by treaty stipulations. In interstate extradition the acts of Congress as well as the State statutes exclude altogether any inquiry into the guilt or innocence of the accused, the only conditions of the statutory obligation of the executive to return the accused being, first, that there is an indictment or information against him (of which an exemplified copy is sufficient evidence, N. Y. Crim. Code, 827, 829), and, second, that the accused is a fugitive from justice (U. S. Rev. Stat., 5278), *In re* Leary (10 Ben., 197).

It is unnecessary to consider the questions arising on the exclusion of the evidence touching the alleged illegality in the drawing of the Georgia grand jury or to discuss at much length either the sufficiency of the very complicated indictment as a pleading, or its force and weight as evidence. As explained in the Dana case, those two questions are altogether distinct, and while I have
88 some doubt, but do not need to pass, on the question of the sufficiency of the indictment as a pleading, I have no doubt that viewed as an affidavit, it is insufficient in its statement of facts and circumstances to justify a removal when, as in this case, an examination has been demanded by the accused and its sufficiency challenged. Witnesses for the prosecution having at least some knowledge of the facts, were in attendance before the commissioner, but were not examined as to the offence, nor were they allowed to testify for the defendants on cross-examination, so that the facts and circumstances on which the magistrate should form his judgment have not in fact been made known. I add some observations on the indictment as a pleading and as evidence.

2. The gist of the offence of conspiracy is in the illegal combination and intent, and the statute of limitations begins to run from the time the conspiracy is formed. The crime may be complete though the intent was never accomplished. And though the statute offence requires an overt act "to be done by one or more of the parties to the conspiracy," or some act "to effect its object," yet this act, as in the common-law offence of conspiracy, is not regarded as an essential part of the offense itself, the statutory provisions being construed as requiring such an act to be proved as a condition of conviction in order to give to the defendants a *locus penitentio* (U. S. *v.* Britton, 108 U. S., 199). It is held to be sufficient, therefore,
89 if the overt act is so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation.

U. S. *v.* Donan, 11 Blatch., 168.
U. S. *v.* Boyden, 1 Low., 266.
U. S. *v.* Sanche, 7 Fed., 715.
U. S. *v.* Bonson, 70 Fed., 591.

In the first and principal count the indictment states, in effect, two conspiracies to defraud the United States. The first, not directly charged as a conspiracy, but called a "fraudulent scheme" and set forth by way of inducement, it is alleged to have been formed on or about January 1, 1891, and to have been thereafter "in continuous process of execution until October 1, 1897." As an original conspiracy this was evidently outlawed before the indictment was found in December, 1899. The second conspiracy and the one relied on, is an alleged conspiracy formed January 1, 1897, to defraud the United States "by applying the previous 'fraudulent scheme' to the execution of two contracts previously obtained, it is alleged, by means of said fraudulent scheme on October 6, 1896;" and counts 2, 3, 4 and 5 state certain alleged overt acts done to carry this new conspiracy into effect. These averments of overt acts, however, cannot be resorted to in order to aid any defective averments
90 as to the conspiracy itself or as to the means by which it was to be accomplished, which in this case were necessary to be set forth.

As the original fraudulent scheme of conspiracy is alleged to have been in continuous process of execution from January 1891 to October 1897, and therefore included the two contracts of October 8, 1896, (the only subjects in the indictment), it is evident that the averment of a new conspiracy on January 1, 1897, to apply the old conspiracy to the execution of the contracts obtained by means of the former one (at the time excluded by the statute of limitations) and already in course of execution, is only a pleader's device to avoid the effect of the statute of limitations as against the original fraudulent scheme. But as each new overt act in furtherance of the common purpose becomes in law a new conspiracy, the time of the conspiracy may be laid within the period of the statute of limitations, if the overt act was within that period, the prior combination, if established, and the later overt act being evidence from which a jury may infer the new conspiracy.

People *v.* Mather, 9 Wend., 229.

Com. *v.* Bartilon, 85 Penn. St., 482–489.

I have considerable doubt, however, whether the averment-
91 of the means by which the conspiracy of January 1, 1897, was to be effected are indicated with such definiteness, clearness and certainty as seems to be required. See 4 Encycl. of Plead., 722.) In Commonwealth *v.* Hunt (4 Metcalf, 111), in which this subject is fully discussed, Shaw, Ch. J., says, p. 125:

Conspiracy is an offence which especially demands the application of that wise and humane rule of the common law that an indictment shall state, with as much certainty as the nature of the case will admit the facts which constitute the crime intended to be charged. This is required to enable the defendant to meet the charge and prepare for his defence, and in case of acquittal or conviction, to show by the record the identify of the charge, so that he may not be indicted a second time for the same offence. * * * This fundamental rule is confirmed by the declaration of rights, which

declares that no subject shall be held to answer for any crime or offence until the same is fully and plainly substantially, and formally described to him. * * * If the criminality of the offence which is intended to be charged consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended use of fraud, force, falsehood, or other criminal or unlawful means must be set out in the indictment.

In the prior case of Lambert *v.* The People (9 Cowen, 578), it was also held upon elaborate consideration by Marcy, J., that—

Where in an indictment for conspiracy the object of the conspiracy is not a legal crime, the means intended to be used must be particularly set forth and show that those means are criminal.

This doctrine has been repeatedly enforced in the decisions of the Supreme Court.

U. S. *v.* Cruikshank, 92 U. S., 542–558.
United States *v.* Britton, 108 U. S., 199.
92 U. S. *v.* Carll, 105 U. S., 611.
U. S. *v.* Hess, 124 U. S., 483.
Pettibone *v.* U. S., 148 U. S., 197.
Blitz *v.* U. S., 153 U. S., 308–315.
State *v.* Parker, 43 N. H., 83.

Now, the only means stated by which the alleged conspiracy of January 1, 1897, was to be carried out is by "applying" the prior "fraudulent scheme to the execution and completion of work under the contracts of October 8, 1896, and in obtaining the money in fraudulent accounts which should be rendered thereunder." But of the fifteen or twenty devices which it is alleged that scheme "contemplated" three-fourths relate to the terms, specifications, and letting out of the contracts themselves, so that most of the scheme could not possibly be "applied" to a conspiracy formed on January 1, 1897, several months after the contracts were let out. Of the remaining means or devices what ones are meant to be charged is left wholly undefined. This is all the more vague and uncertain since even the original fraudulent scheme itself is only alleged to
93 have contemplated that the conspirators "would use some one or more or all of said means and devices and such additional devices as might become necessary." This is certainly very vague and uncertain as to the means used.

The overt act charged in the second count is irrelevant, since it does not appear to be in any way connected with the conspiracy alleged, nor within any one of the means or devices set forth in the conspiracy count. The overt acts charged in counts 3, 4 and 5 are the presentment of alleged "fraudulent claims" to Captain Carter of the corps of engineers, without any statement how or wherein they were fraudulent. The items of the claims are given, dated July 1, 1897, apparently verbatim, for work and material furnished under the contract of October 8, 1896. It would be naturally inferred that the charge intended was that these bills were in some way false and not according to the contract; that is, that the work done and

the materials supplied were less than was claimed, or that they were of inferior qualify, or in some way different from the contract, or that the price was incorrect.

But there is no such averment as respects any of the bills referred to in any of the counts; nor is it stated that any one of them is false, while from other passages in the indictment, as well as from the observations of counsel in the stenographer's report of the proceedings, it would seem that the supposed fraudulent character of
94 the bills was not founded upon anything incorrect in them or in the work, but upon the alleged fraudulent devices contemplated in the preparation and letting of the contracts themselves, no single one of which devices is, however, definitely alleged to have been really employed. Such averments not only do not reasonably apprise the defendants of the nature of the charges they must meet but are calculated to mislead them. This applies to all the counts except the second. The conspiracy charged in the sixth count relates wholly to future contracts to be let thereafter, *i. e.*, after January 1, 1897, while the overt acts stated in counts seven and eight relate wholly to the prior contracts of October 8, 1896. On this additional ground, counts 6, 7 and 8 would seem to be necessarily bad.

Counts 9 and 10 alleged conspiracies on July 1, 1897, as respects the same contracts and bills referred to under the conspiracy of January 1, 1897, in counts 1 to 5. As the presentment of false or fraudulent bills for payment to a Government officer is itself a criminal offense (sec. 5238, Rev. Stat.), I should regard these counts as good had the nature of the fraud been sufficiently indicated.

3. Without passing definitely upon these objections to the indictment as a pleading, they are much more important when the indictment is offered as evidence of the facts and circumstances
95 upon which a magistrate, after examination demanded, is called upon to find probable cause of guilt. Mere defects in pleading might be disregarded if a crime was otherwise sufficiently shown to have been committed, since commitment and removal may in proper cases be made without any prior indictment.

In re Price, 89 Fed. Rep., 94.

But when there is no evidence of guilt except such — a copy of the indictment itself, considered as an affidavit, affords, there is nothing to cure its defects or its failure to give a consistent, clear and satisfactory statement of the evidential facts on which the conclusion of probable cause may be based.

The mere fact that indictment has been found in another jurisdiction, without producing it, is no evidence of probable cause before a committing magistrate; and a mere affidavit oo that fact will not only justify even the issuing of the warrant of arrest.

Ex parte Solomon, 1 Abb. N. S., 347,

Ex parte Leland, 7 Abb. N. S., 64.

It is only the facts and circumstances stated in the indictment, if any such are properly stated, that are of any value as evidence, and

these statements are to be judged and weighed according to what they may be worth.

96 The present indictment, even more than that in the Dana case, shows that it was drawn and designed as a pleading only, and not as a statement of the facts from which a judicial finding of probable guilt might reasonably be drawn.

(1.) Its statement of two separate conspiracies with reference to the same two contracts of October 8th 1896, viz: on *on* January 1, 1897, and another on July 1, 1897, and both upon the same overt acts, since it appears that all of the seven months' bills were presented for allowance together and at the same time, on July 1, 1896, is most improbable as a fact though allowable as a pleading both being evident-ally adopted, as I have said, to avoid the statute of limitations, which would be applicable to a charge of conspiracy based upon either the original scheme or the contracts of 1896.

(2.) The inconsistency in the first count and its consequent vagueness are manifested in alleging that on January 1, 1897, there was a conspiracy to apply the prior "fraudulent scheme" as a whole to past contracts when most of the particulars of that alleged scheme could not possibly be thereafter applied to them; and of the rest there is no definite statement of what devices were to be applied, or that any one was, in fact, applied.

(3.) The mere statement of the presentment of "fraudulent claims" without any indication how or wherein they were fraudulent, which is the basis of all the counts, except the second, is not a proper

97 or sufficient statement of any facts or circumstances on which a judicial judgment of probable cause can be based; it would not be sufficient for an arrest, even in a petty civil case.

(4.) There is no allegation anywhere in the indictment that the work and materials supplied and the bills presented were not strictly according to contract, that the prices claimed or allowed were exorbitant, that improper work was passed or improper substitutions made, nor are any facts stated showing actual fraud or that the Government has been defrauded of a dollar. Even if no fuller statement on these points is essential as a matter of pleading, it is indispensable as evidence of probable cause of guilt that some such actual fraud in the overt acts should be shown on the hearing as upon the trial in order to prove that these acts were in truth in pursuance of the alleged conspiracy and were not done in an honest fulfillment of the contracts referred to, as the defendants had a right to do within the *locus penitentio* which the statute allows.

In most cases, however, the fraudulent or criminal character of the overt acts is the chief if not the only evidence of the unlawful conspiracy (Com. *v.* Bartilson 85 Penn. St., 482; 2 Wharton Cr. L., 246). The indictment being the only evidence of guilt that is presented, some facts showing fraud in the overt acts are as necessary to appear there as they would be necessary to be proved at the

98 trial. In this indictment there are charges of fraud and of "fraudulent claims" but not a fact or circumstance is stated from which a magistrate or judge could rightfully find actual fraud or probable cause for forming such a judgment. The indictment

in other words is purely a charge, a pleading for the purpose of putting the defendants on trial without any evidential facts from which fraud or conspiracy can be judicially inferred.

(5.) The failure of the prosecution to examine the Government witnesses present, Captain Gillette among others, in reference to the offence itself, and the persistent objection to any cross-examination of these same witnesses and to the defendants' examination of others having knowledge of the facts, resulting in the exclusion of all testimony as to the probable guilt of the accused, which is the principal object of such examinations, together with the circumstances above stated, show that the withholding of all evidential facts, both in the indictment and before the commissioner, was designed in consequence of a misapprehension of the proper course of procedure under section 1014 in connection with the statutes of this State and the ordinary practice thereunder.

I know nothing of the probable guilt or innocence of the accused, except from the record before me. Considerable evidence which was offered and under the law should have been received, indicates innocence as far as it goes. Opposed to this is the Georgia indictment alone, which, on examination, proves to be a bare pleading barren of any such statement of facts and circumstances as to warrant any judicial finding of probable fraud. Of the eight over- acts alleged, two of the principal ones, viz., the issuing of two checks for the whole work referred to under both contracts of October 8th, 1896, were done in New York, where the offence, if any, was therefore equally triable (4 Ency. Pl. and Pr., 706; People *v.* Mather, 4 Wend., 229; Com. *v.* Bartilson, *supra*). The accused, even if guilty, though triable in Georgia also, can only be removed to that jurisdiction by proceedings regularly conducted according to law. To order their removal otherwise would be an illegal act and scarcely distinguishable from virtual abduction under the forms of law.

99

For the above reasons the application should be denied and the defendants discharged, without prejudice to such other proceedings as may be advised.

April 4, 1900.

100 EXHIBIT "D." Referred to in Annexed Petition.

United States District Court, Southern District of New York.

THE UNITED STATES
vs.
BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. Gaynor and O'rs.

The above-named defendants having appeared before me in custody of the United States marshal under a commitment from John A. Shields, United States commissioner for the southern district of New York, to await a warrant of removal to the eastern division of the southern district of Georgia, and having given bail for their ap-

pearance before me from time to time and to surrender themselves to the United States marshal, when required and abide the order of this court and not depart without leave; and Henry L. Burnett, United States attorney for the southern district of New York, and Marion Erwin, United States attorney for the southern district of Georgia, having moved for a warrant to remove the defendants from the southern district of New York to the eastern division of the southern district of Georgia, and the defendants having objected to the issuance of such warrant;

And after hearing Henry L. Burnett, Marion Erwin, United States attorneys, and Ernest E. Baldwin, assistant United States attorney, in favor of said motion, and Abram J. Rose and L. Laflin Kellogg, of counsel for the defendants, in opposition thereto;

101 And the motion for the warrant of removal upon the record as it now stands having been denied, and the matter sent back to the commissioner for further competent testimony offered by either side in accordance with the opinion rendered herein;

It is ordered that the defendants attend before John A. Shields, commissioner, at his rooms in the post-office building, on July 6th, 1900, at 2 o'clock p. m., and the defendants and each of them are required to be present at that time on such proceeding.

Dated New York, June 26th, 1900.

ADDISON BROWN.

(Endorsed on back as follows:)

U. S. district court, southern district of New York. The United States *versus* Benjamin D. Greene and others. Order denying motion for warrant of removal and sending the matter back for further testimony. Henry L. Burnett, United States attorney.

102 EXHIBIT "E." Referred to in the Annexed Petition.

United States District Court, Southern District of New York.

UNITED STATES
against
BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. GAYNOR and Others.

Removal proceedings, section —, U. S. Rev. Stat.

Marion Erwin, assistant, U. S. attorney for the Government.
Kellogg & Rose for respondents.

BROWN, *J.*:

Since this matter was previously before me (100 Fed. 941) a large amount of testimony pro and con has been taken by the commissioner on the question as to probable cause of the commission of the offence charged, as well as proof also concerning alleged irregularities, which it is contended vitiated the indictment upon which the removal of the defendants is sought.

The facts as respect the latter objection are briefly as follows:

The offences charged being in the eastern division of the southern district of Georgia, the grand jury was necessarily impanelled and the indictment found in that division. The drawing of the names of jurors for venire was done at Macon in the western divis-
103 ion. Prior to the drawing of the names the judge of the district, pursuant to section 802 of the United States Revised Statutes, for the purpose of securing a jury "the most favorable to an impartial trial and so as not to incur any unnecessary expense," directed.

"That the jurors be returned from the counties of said eastern division other than the counties of Chatham and Glyn."

So that the jurors from Chatham and Glyn counties, in which Savannah and Brunswick are situated were excluded from consideration although their names were not removed from the box before drawing.

Names were then drawn from the box, and as they were drawn, all such names as were from those two counties were laid aside, and the venire was made up from the others drawn. Afterwards the latter jurors, as thus drawn, were summoned to appear at Savannah within the eastern division and from them the grand jury was selected and sworn.

The whole number in the jury-box for the eastern division when last revised in 1897 was 562, of which 305 were from Chatham and Glyn counties. From these 197 had been drawn out for several prior juries. But even supposing that the names of all those who were previously drawn out had been put back, the whole number of jurors in the box, excluding those from Chatham and Glyn
104 counties, would be but 257. Section 2 of ch. 52 of the act of June 30, 1879 (Sup. Rev. St. p. 270) requires, however,

"That all such jurors * * * shall be publicly drawn from a box containing at the time of this drawing the names of not less than three hundred persons the qualifications prescribed in sec. 800 of the Revised Statutes," &c.

It is contended for the defendants that by the order of the judge excluding all jurors from Chatham and Glyn counties, there remained in the box at the time of this venire at most but 257 competent jurors, instead of 300, as required by the above act, because by force of the judge's order the jurors became incompetent for this venire; and that the legal force and effect of the order were the same as if the names of the Chatham and Glyn county jurors had been actually withdrawn from the box before the drawing commenced.

I have no doubt that the requirements of the act of 1879 are mandatory, and that any substantial departure from its provisions will invalidate the subsequent proceedings if due objection is seasonably raised. But even if the judge's order was equivalent to a withdrawal from the jury-box of the names of the jurors from Chatham and Glyn counties, as the defendants contend (which is itself a question so that in legal effect only 257 names remained in the box when the jury was drawn), there are still two sufficient reasons why this

objection should not prevent a removal of the accused for trial, if a case for removal is otherwise made out. (*a.*) Because the question is a new one arising upon the construction and effect of an im-
105 portant statute, and not decided or in any way passed upon by the Supreme Court as the ultimate authority. Any decision in defendants' favor in this proceeding could not be reviewed or corrected if erroneous in the ordinary mode of review, and justice would by such an erroneous ruling be defeated; whereas by leaving the question for the trial court, this objection will continue to be equally available to the defendants there, and any decision thereon adverse to the defendants, if erroneous, can be corrected in the regular course of appeal. It is only where there can be no reasonable doubt concerning the invalidity alleged that removal should on such grounds be refused.

(*b.*) Under the ruling of the Supreme Court in the case of Agnew *vs.* U. S. (165 U. S., 36) there is at least some question whether the objection to the grand jury has not been waived. The general rule is that such objections should be taken at the first opportunity, and unless so taken are waived. I had supposed, indeed, that the time when the accused was arraigned and called on to plead, was regarded as the first opportunity and in time; but in the above case the accused was held to have waived the objection because being within the district he had not before arraignment come into court and moved to set aside the proceedings. This question like the last must be referred to the trial court.

Of the same nature is the further objection that the grand
106 jury were drawn in the western division of the district instead of the eastern division as is incorrectly stated on the face of the indictment. So far as I know, it has never been adjudged, nor is it clear to me that the drawing as proved is such an irregularity, if it be an irregularity, as to make void the subsequent proceedings under the act of January 29, 1880 (1st Sup. Rev. St. 277) dividing the southern district of Georgia into the eastern and western divisions. That act has no specific directions on this point; and the place of drawing, if within the district, seems immaterial and this objection, as well as that relating to the mode of putting the names into the box, should be refered to the trial court.

Probable cause.—Upon a large amount of testimony taken under the order referring the matter back to the commissioner, he has committed the defendants for trial by order of March 21, 1901, in which he states that

"After full and fair examination touching the charge in the annexed warrant named, it appears from the testimony offered that there is probable cause to believe the defendants guilty of the charges therein contained."

Upon the question of the existence of probable cause to believe that an offence has been committed, the rule as respects any review of the commissioner's finding, is the same whether the question arises upon an application for removal to another district under section 1014 or upon *habeas corpus* and certiorari or an appeal therefrom

in cases of international extradition. In all such cases the
107 question upon review never is whether the proof was such as would be required to convict the accused upon a trial by jury; but only as to the existence of any legal evidence before the commissioner upon which he might find that there was reasonable cause to believe that the crime has been committed. In the case of Bryant *vs.* U. S., 167 U. S., 104, the question in the opinion of Mr. Justice Brown is stated to be,

"Whether there was any legal evidence at all upon which the commissioner could decide that there was evidence sufficient to justify his commitment for extradition; or, as stated in Ornelas *vs.* Ruiz, 161 U. S., 502, 508, 'if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offence charged is within the terms of the treaty of extradition, and the magistrate in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*.'"

In the prior case of Oteiza 136 U. S., 330, 334, the Supreme Court by Mr. Justice Blatchford says:

"If the commissioner has jurisdiction of the subject-matter * * * and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court, on *habeas corpus*, either originally or by appeal."

The commitment by the commissioner and his finding of probable cause have been made after an extremely full hearing of all the evidence offered on both sides. No evidence reasonably pertinent has been rejected. Objection is made that irrelevant and incompetent
108 evidence offered by the Government was received by him; but as stated in the former decision, the evidence receivable in such preliminary examinations, is not to be strictly limited by the technical rules applicable upon the final trial; and upon a charge of fraud, or of conspiracy to defraud, a somewhat wide latitude in the testimony is always allowed even on the final hearing, for the purpose of showing the intent. The proof of the charges in this case does not consist of any direct and certain testimony of the commission of the offences charged, but rests upon many facts and circumstances in a long course of dealing, from which it is claimed that the inference of an unlawful intent to defraud the Government must reasonably be inferred; and the bills alleged to be fraudulent in the last counts of the indictment, are claimed to be fraudulent, not so much because they were not according to contract, as because the contracts themselves were fraudulent, and procured through a fraudulent conspiracy with Captain Carter, an employee of the Government. Considering the nature of the case, therefore, I find

no such objections to the testimony admitted by the commissioner as to vitiate his findings or require reconsideration by him.

As respects the finding of probable cause, I have carefully considered the very extended briefs and arguments of counsel, and have examined the voluminous evidence with a view to ascertain whether there was competent evidence before the commis-
109 sioner sufficient in itself to sustain his finding of probable cause. Under the rule above stated, it is not for the judge on an application for removal, to compare different parts of the testimony in order to determine their relative weight, or to substitute his own judgment for that of the commissioner, even though it might on the whole evidence be different. By this, however, I do not mean to be understood as expressing any opinion whatsoever on the merits of the case. The defendants have given a great deal of evidence tending to show that their contracts were fairly obtained, their work well and honestly done, and that the Government has not been defrauded a dollar.

The Government on the other hand has given evidence tending to a contrary conclusion; and it has shown beyond question that Captain Carter, the employee of the Government and the engineer in immediate charge of the work on the Government's behalf, had for several years immediately preceding the contracts referred to in the indictment, received from the contractors continuously through his father-in-law, in many divisions of profits, one-third of the final net proceeds of each contract remaining for division among the chief contractors; and that this one-third amounted in the aggregate to over $700,000. This, it is claimed gives significance and meaning to many other facts in evidence showing a fraudulent and illegal combination between the defendants and Captain Carter to
110 benefit themselves at the expense of the Government, and to procure the allowance and payment of excessive and fraudulent bills by means of contracts fraudulently procured.

A case presenting such circumstances is especially one that should be submitted to a jury trial. Nor need there be any apprehension that an impartial court and jury will not reach essential justice, or that while guarding jealously the honor and interests of the Government, they will not also appreciate the legitimate rights of the defendants, the peculiar difficulties, risks and hazards of such contract work, the excellence and merit of that which is well done, and the rights of the defendants by legitimate business methods to lessen competition and to secure as favorable contracts as they can; and determine fairly whether the contracts in question were fraudulent, or obtained by illegal methods, or by a conspiracy with the engineer in charge to abuse the opportunities of his position in order to despoil the Government and obtain exorbitant prices for their common benefit.

Having found in the previous decision that the 9th and 10th counts of the indictment are good, whatever may be held as to the counts preceding them, the defendants should be ordered to be removed for trial, or to give bail for their due appearance.

May 15, 1901.

111 EXHIBIT "F." Referred to in the Annexed Petition, being all the Testimony and Exhibits on the Jury Question Before Com. Shields in case of U. S. *vs.* Greene *et al.*

JOHN M. BARNES, a witness called on behalf of the defense, being duly sworn, testified as follows:

Examined by Mr. ROSE:

Q. What is your full name?
A. John M. Barnes.
Q. Where do you reside?
A. Macon, Georgia.
Q. What, if any, official position do you hold under the United States Government?
A. I am the United States marshal for the southern district of Georgia.
Q. How long have you been such marshal?
A. Since the 15th of June, 1897.
Q. Were you such marshal on the 27th of November, 1899?
A. I was.
Q. Do you remember being at the city of Savannah at the term of the United States court that opened on the 8th of December, 1899?
A. I was there at the term that opened about that time, on the 4th though I think it was.
Q. The 4th of December?
A. I think it was the 4th.
Q. Who was the presiding judge of the court?
A. Judge Speer.
Q. Were you present when the grand jury were impaneled?
A. Yes.
Q. In Savannah?
A. Yes.
Q. Do you recollect the name of the gentleman who was appointed foreman?
A. His name was Mackey.
Q. What was his full name?
A. I don't recollect his initials; McKey they pronounce it.

112 Q. M-c-K-a-y?
A. Yes.

Mr. ERWIN: I want to make my objection here to the proof of oral testimony of these matters of record there, because Mr. Barnes may or may not get that right. All these things are matters of record, who was foreman of the grand jury, and in fact it is of record in this case in the certified copy of the indictment. Not to be captious at all, but because I do not want the oral testimony here to undertake to vary the solemn records of the court, and because Mr. Barnes may or may not remember correctly.

Mr. ROSE: This, may it please your honor, is simply for the purpose of identifying the particular grand jury; that is all. As to

who was appointed foreman of the grand jury, within this witness's knowledge.

The COMMISSIONER: Of course the records are the best evidence, but if you insist upon it I allow it.

Mr. ROSE: Let me take this witness's testimony and move to strike it out afterwards. I am trying to accommodate the witness.

Mr. ERWIN: We have the certified copy of the indictment here.

Mr. ROSE: It is Thomas S. I think. I am not certain about the S.—McKey, M-c-K-e-y.

The WITNESS: They pronounce it Mackey.

Q. Among the papers in evidence, to cure any uncertainty, has been offered a certified copy of an indictment purporting to
113 have been found at the November term, 1899, by the grand jurors of the United States chosen, selected, impaneled and sworn in and for the eastern division of the southern district of Georgia, which purports to have been filed on December 8th, 1899, and that the foreman of that grand jury was Thomas S. McKey. Do you recollect being present at Savannah at the time a grand jury was impaneled in the early part of December, of which grand jury Mr. McKey was the foreman?

A. I was.

Q. You recall that fact?

A. Yes.

Q. In what division of the southern district is the city of Savannah?

A. Savannah is in the eastern division.

Q. Is the city of Macon in the same division?

A. No; it is in the western division.

Q. Of the southern district?

A. Of the southern district of Georgia.

Q. Did you as marshal, summon, or cause to be summoned, the grand jury that was afterward impaneled in the city of Savannah in December?

A. I did.

Q. Were you present at the time that grand jury was drawn?

A. I was.

Q. Where was it drawn?

A. In the city of Macon.

Q. In the city of Macon?

A. Yes.

Q. On what day?

A. It was the latter part of November; I think on the 22nd of November.

Q. What year?

A. 1899.

Q. Can you give me the time of day, Mr. Barnes?

A. I don't recollect; near noon though, I think.

114 Q. Whereabouts; in what particular part or building?

A. It was in the United States court-room.

Q. In the United States court-room?

A. Court-room.
Q. And that room is in the United States court building there?
A. Yes sir.
Q. In the city of Savannah?
A. In the city of Macon.
Q. Who do you recall as having been present?
A. At the drawing of the jury?
Q. Yes.
A. I positively recall only four persons including the judge and myself.
Q. Name them please?
A. One was Mr. L. M. Erwin, the deputy clerk now present, and the other was the judge's stenographer, J. N. Tally.
Q. You think there were others present, do you?
A. Yes.
Q. But you don't recall them positively?
A. I don't recall them positively.
Q. How long before the actual drawing of the jury took place did you know of it?
A. A few minutes.
Q. A few may mean to different people a different time?
A. Perhaps 10 or 15 minutes.
Q. Do you have a box for the eastern division and a box for the western division. By box I mean jury-box?
A. Yes, sir.
Q. Who holds the keys of the boxes?
A. The marshal holds them; I hold them.
Q. Did you in November hold the keys of all the boxes?
A. Yes.
115 Q. When you went into the court-room on the 22nd of November, about noon, did you take the keys with you?
A. I did.
Q. Of what boxes?
A. Of the boxes for the Savannah division.
Q. Of the box. Was there more than one box for the Savannah division?
A. Only one I think.
Q. Then instead of boxes, you mean box?
A. Yes sir, that is right.
Q. Of the division of which the city of Savannah, is a part, you mean?
A. Yes sir.
Q. The city of Savannah does not alone constitute the whole of the eastern division?
A. No.
Q. Is there more than one box for the eastern division?
A. One grand-jury box for the eastern division.
Q. And is there a court-house in the eastern division; United States court-house?
A. Yes, sir; at Savannah.
Q. And that was the case in 1899?

A. It was.

Q. Prior to that time had you seen the box in the city of Savannah?

A. I could not positively swear, but I suppose I had seen it there a number of times.

Q. When did you last have the keys and use them prior to November, 1899?

A. I don't remember that.

Q. And can you tell me where you used them to open the box prior to November, 1899?

A. At Macon I think.

Q. Not in the city of Savannah?

A. No.

116 Q. After you locked the box on the occasion that you used it, what happened, or did you lock the box on the occasion that it was used prior to November, after a jury had been drawn?

A. Whether I turned the key or not I don't recollect, but the judge supervised it all. The judge sealed it and very probably with his own hand locked it.

Q. And gave you the key?

A. Gave me the key.

Q. Do you remember when that was?

A. No, I do not.

Q. About how long before the last of November?

A. I think about March or April before.

Q. Of 1899?

A. 1899.

Q. Had you seen the box from—assuming it to be March—from that time down until you went into the court-room on the 22nd of November?

A. I think not.

Q. And you don't know where it was or who had possession of it?

A. I do not.

Q. When you went into the court-room on that day was the Savannah box there?

A. It was either there as I entered the room or was brought in within the next three or four minutes.

Q. And what was done with it when it was brought in?

A. The judge opened it.

Q. No; who brought it in?

A. Mr. L. M. Erwin, I think.

Q. He was the clerk?

A. Deputy clerk.

Q. And when he brought it in where did he put it?

A. On the judge's stand before the judge.

117 Q. On the bench in front of the judge?

A. On the bench.

Q. Where was Mr. Tally?

A. Well, in the court-room; I don't recollect exactly when he

entered, but before the drawing commenced he was sitting at the right of the judge.

Q. And where did you stand or sit with reference to the judge?

A. I was standing at the judge's left.

Q. The judge then was between you and Mr. Tally?

A. Yes sir.

Q. All upon the bench?

A. All on the bench.

Q. And where was Mr. Erwin, the clerk?

A. Mr. L. M. Erwin was sitting at his desk to the right, and a little in front of the judge's bench.

Q. To whom, if anybody, did you give the key of the jury-box?

A. At that time do you mean?

Q. On the 22nd of November when you went in?

A. I handed it to the judge.

Q. To Judge Speer?

A. To Judge Speer.

Q. And what did he do with it?

A. Opened the jury-box.

Q. And left the key in the lock?

A. Yes.

Q. What was done then with reference to taking any names from the box, and by whom was it done?

A. The judge and I took them from the box. I don't think any one else; I am reasonably sure.

Q. Who took the first name from the box?

A. The judge.

118 Q. And when it was taken what was done with it?

A. If it was accepted the name and address was called out to the clerk, and the judge laid it, if I remember right, by the box.

Q. What do you mean by "if accepted"?

A. If the juror was impaneled; was drawn.

Q. You mean accepted by the judge?

A. By the judge, yes.

Q. And if rejected by the judge?

A. It was laid down there also I think perhaps in another pile, an inch or two from the ones accepted.

Q. Then after the judge had drawn one or more names from the box and they had been accepted or rejected, as you have stated, did you draw any names from the box?

A. I did.

Q. And what did you do when you drew a name from the box?

A. I passed it to the judge.

Q. And what did he do?

A. He accepted or rejected it, as the case might be.

Q. Now did he not put the rejected names back in the box again as the drawing proceeded, or were rejected names put back after the drawing was completed?

A. I am reasonably sure that they were left out until the drawing was completed.

Q. And then put back inside?

A. And then put back.
Q. Was the name read out when the ticket or ballot was rejected?
A. I think not.
Q. And only yourself and the judge knew who it was,
119 whose name it was that was on the particular ticket that was rejected?
A. I do not see how any one else could have known.
Q. I say it was not announced in any way; it was not read out?
A. No; I think that nothing was said about it, except that it was the wrong county.
Q. But whom it was was not mentioned?
A. I think not.
Q. How many names were drawn in that way?
A. I don't recollect but I would say about 48.
Q. That was 48 names that were accepted?

The COMMISSIONER: Do you mean there were 48 names in the whole?
Mr. ROSE: No; 48 names drawn which were accepted.

A. I think I will change that. I think it was about thirty.
Q. And how many names were drawn that were rejected?
A. I could only guess at that.
Q. Approximate as near as you can now?
A. Perhaps 15 or 20.
Q. How many names were in the box?

Mr. ERWIN: Wait a minute. I move to strike out that answer as guessing; only guessing.
The COMMISSIONER: He cannot guess of course.
Mr. ROSE: I asked him to approximate his best recollection.
120 The COMMISSIONER: Give us your best recollection about it. Guessing won't do.

A. My best recollection is that the number rejected was about two-thirds of the number accepted.
Q. Then on that basis if 30 were accepted, two-thirds of 30 would be 20?
A. Twenty rejected.
Q. Now, Mr. Barnes, how many names were in the box when the drawing began?
A. I don't know.
Q. Did you see them put in originally?
A. I did not.
Q. Do you know how many were in after the drawing was over?
A. I do not.
Q. Were they counted while you were there?
A. No.
Q. Were they counted in your presence before the drawing began?

A. They were not.

Q. Could they have been counted after the previous drawing, which was in March or April, and prior to the opening of the box by the judge, when you gave him the key?

A. I cannot imagine any way in which they could have been.

Q. You had the key?

A. I had the key.

Q. And there was only one key as you understand it?

A. Yes.

Q. And the lock did not bear any evidence of having been tampered with?

A. No.

Q. Therefore are you able to tell how many names there were in the box when the drawing began?

A. I do not know.

Q. Did you have any instructions with reference to the
121 service of these jurors?

A. I was given positive instructions about making an earnest effort to serve them, but nothing peculiar about it that I recall.

Q. From whom did you receive those instructions?

A. The judge.

Q. Let me call your attention to it. Was there any instructions given that the jurors should be notified or requested by the party serving them, not to let it become public that they had been drawn as a grand juror?

A. I don't remember positively.

Q. Will you say there was not such instructions?

A. No, I can't say. I remember hearing something about it, but whether it was just rumor or instructions I don't recollect, because lots of rumors have come in 12 months or 11 months.

The COMMISSIONER: We don't want any rumors.

Mr. ROSE: No.

The WITNESS: I can't recollect whether it was rumors or what.

Q. Did you give any instructions to your deputies that served these?

A. I don't know of anything out of the ordinary instructions; whatever instructions——

Q. If you gave them any instructions would it be printed or in writing?

A. In writing.

Q. Have you looked so that you can tell now whether you did or not give any such instructions?

122 A. I don't remember seeing the letter since that date.

Q. Did you keep copies of the letters that you sent?

A. I think I did.

Q. What are the names of the deputies who served these jurors: give their names and addresses?

A. C. J. White, Savannah; J. P. Cason, Brunswick, and F. E. Dismuke, Thomasville. I think they served them all.

Q. And the notices and a letter was sent to each one of the people for the parties living in their vicinity?

A. By the deputies?

Q. No; you sent the notices to the deputies, didn't you?

A. Yes, sir.

Q. Together with a letter?

A. With a letter, yes.

Q. Will you be kind enough on your return home to send me a copy of the letter in your own handwriting, certified to by you as being a copy of the letter?

A. I have no individual choice or inclination either way. That is, I am perfectly willing individually. I don't know whether it is proper for me to do so.

Q. Well, do you decline to do that, simply as a question of producing you here by a *subpœna duces tecum?*

A. I have expressed my perfect personal willingness to do so.

Q. I ask you personally to send me personally copies of the letter sent to your deputy marshals in reference to the service of these grand jurors drawn in November?

A. I do not know that I am authorized to do so, Mr. Rose. That is the only question with me.

123 Q. Your office is a public office?

A. Yes, sir.

Q. And your letters are public documents?

A. Yes.

Mr. ROSE: Mr. Erwin don't object to it and it is simply to save Mr. Barnes a trip to New York again to produce those letters.

The WITNESS: I think I have answered as fully as I can, that I am perfectly willing as far as I am personally concerned.

Q. Will you do so?

A. I do not know how to answer the question, Mr. Rose, because I do not understand my authority in the matter.

Q. From whom will you ask authority?

A. I don't know whether I should ask the judge or the attorney general.

Q. Well, will you let me know whom you do ask and whether authority has been refused you?

A. No; I would not give any information except on the stand, because I fear it would be improper.

Mr. ROSE: Now I think I am practically through with this witness, but I would like to adjourn the examination pending until tomorrow at half past 10, and I won't keep him so that he cannot go at 1 o'clock, even if I have to subpœna him over again to produce those papers.

Mr. ERWIN: I understand the objections made at the beginning of this testimony of Mr. Barnes is intended to apply to the whole of it, that in so far as he has undertaken to prove the act of a

124 court of record otherwise than by copies of the orders and records themselves, orders made in regard to the drawing of

the jury, what counties they should be drawn from, and the record itself showing the list of jurors who were drawn, and all of those matters being matters of record in a court of record, and being matters of record in this case, that so far as he undertakes to prove them, or attack them collaterally or outside of the court itself, that it is illegal and incompetent evidence; the record of a court of record being the best evidence and being accepted in all of the courts.

The COMMISSIONER: It isn't worth while to argue that, because I sustain the proposition. If you require them to bring the court records here, or certified copies of them, that is all there is of it.

Mr. ROSE: That question need not be argued now.

The COMMISSIONER: Oh, no.

JOHN M. BARNES' direct examination resumed.

By Mr. ROSE:

Q. Mr. Barnes, when did you first come into the physical possession of the key to the grand-jury box for the eastern division of the southern district of Georgia?

A. Immediately after I was appointed marshal I think.

Q. And you gave the date yesterday but I have forgotten it.

A. 15th of June 1897.

125 Q. From that time down to and including the 1st of January, 1900, has that key ever been out of your possession?

A. It has not.

Q. Except at the time when it was used by the judge to open the box?

A. It has not.

Q. And at the times that it was used to open the box by the judge you were always present?

A. I suppose I was. Mr Rose, let me correct this. So far as the physical possession of the key is concerned I have it in a draw- in a safe. The chief deputy could get that key at any time and I may not know of a thing of that kind.

Q. You were always present, Mr. Barnes, at the time the jurors were drawn from this box during your term of office?

A. I think I was always.

Q. About how many times, according to the best of your recollection, have there been grand juries drawn from that box during your term of office up to and including November 29th, 1899?

A. I could not tell with any definiteness, but perhaps five times.

Q. Who was the jury commissioner for the eastern division of the southern district of Georgia during the year 1899?

A. I think it was Edward S. Elliott.

Q. And where did he reside?

A. Savannah.

Q. And was he the jury commissioner prior to that time?

A. I think so, yes.

Q. And during the entire term of your office up to 1900?

A. I knew of no other.

Q. And the clerk of the court was Mr. H. H. King?

126 A. Yes.

Q. Where did he reside?

A. Savannah.

Q. Did you ever have the grand-jury box and the key thereof present at a time when Mr. Elliott, the jury commissioner, and the clerk Mr. King, were present with you?

A. I have no recollection whatever.

Q. That means that you don't remember that you have?

A. No; I don't remember that I ever was with them when I had it.

Q. Were you present at any time when the jury commissioner and the clerk put any names into this grand-jury box?

A. No.

Q. And by this grand-jury box I mean the box from which the jury was drawn on the 22nd of November?

A. I understand you.

Q. And the answer is the same?

A. The same.

Q. Mr. Barnes, what was done with the tickets containing the names of the jurors that were drawn on the 22nd of November 1899; the tickets of the names of those impaneled or accepted and rejected, to use your words of yesterday?

A. Unless I am greatly in error they were put back in the box.

Q. After the completion of the drawing?

A. Yes.

Q. And the box immediately was then locked up.

A. Yes, sir.

A. And taken in possession by the clerk and you took the key?

A. Yes, sir.

127 Cross-examination by Mr. ERWIN:

Q. Mr. Barnes, your principal office is in the city of Macon, is it not?

A. That is the headquarters, yes.

Q. Headquarters for that district?

A. For the district.

Q. It is the place of residence of the district judge also?

A. It is.

Q. Your chief deputy also resides in Macon?

A. Yes.

Q. And the principal records of your office are also kept in Macon?

A. Yes.

Q. It is the place where processes are docketed and sent out for service?

A. Yes sir.

Q. Mr. Barnes, at the time of the drawing of the grand jury on November 22nd 1899, at Macon, for the approaching session of the

court in the eastern division at Savannah, the Macon court was in session; I mean it was an open-court session at Macon?

A. I don't remember; I think it was. I don't know that I quite understand your question.

Q. I mean to say the drawing was in open court at Macon, I say?

A. In what I understand is open court, in the court-room where we were.

Q. Did you have any knowledge of the fact that just immediately preceding the drawing, that there was an order passed specifying, or an order stating the counties of the eastern division from which the jury were to be drawn, leaving out certain counties, Chatham and Glynn?

128 A. I knew that there had been an order or instructions or intimations or something of that sort. In other words I knew we were not expected to draw from those counties, but I had seen no order.

Q. You had not looked at the order?

A. No.

Q. That was no part of your business, what counties they were drawn from?

A. No.

Q. You were not consulted about that part of it at all?

A. No.

Q. You just came into the court-room with the keys and were present at the drawing of the jury in the manner which you have stated?

A. Yes.

Q. Mr. Barnes, it is quite usual in the drawing of a jury for one division when the courts are sitting in one division—say Macon—and are about to proceed to hold a session of court in Savannah, to draw the jury from the jury-box of the division to which the courts are about to go, and to draw it at the place where the courts are sitting, was it not?

Mr. Rose: To that I object on the ground that it is immaterial and improper. That if the drawing was not provided for by law or authorized by law, no custom can make it legal or proper, and the question whether it was usual or not cannot be taken into consideration in determining whether it was legal or proper.

Decision on the objection is reserved.

129 A. Yes.

Q. Your headquarters were at Macon?

A. Yes sir.

Q. Do you remember the fact that there was a revision of the jury-box; that is, a change in names in the box while you were in office by the clerk and the jury commissioner?

A. Which box do you mean?

Q. I say at Macon; the jury-box at Macon?

A. Yes.

Q. Now when that jury-box was revised——

Mr. ROSE: I object to that unless it is specified as to what box he means, there being proof that there is a box for the eastern division and one for the western division.

Q. I am speaking about the western-division box of that court at Macon. There was a revision of that box?

A. A revision of the box at Macon, yes, for Macon

(By Mr. ROSE:)

Q. For the western division?

A. Western division.

Mr. ROSE: Then I object to that as immaterial, as not relating to the box from which the jury in question was drawn.

Decision reserved.

(By Mr. ERWIN:)

Q. Were you present at that time?

A. I was not present.

Q. You were not present when the names were put in the box?

A. I was not.

Q. You were not present when the box was locked?

A. I was not.

130 Q. And that was done by the clerk and jury commissioner, with which you had nothing to do?

A. I don't know who did it. I suppose they did it.

Q. If you were custodian of the key to the box—you or your chief deputy—the key was gotten from you or your chief deputy and they fixed the box, and after revising the list returned the key back. That was the course?

A. That was what I understood was done.

Q. If there was a revision of the box at Savannah, you would not have anything more to do with it than you would have had in the western division, would you?

A. I suppose not.

Q. When the jurors were drawn from the box their names were entered by the clerk on a panel or list, were they not?

A. Yes. You are speaking of when this grand jury was drawn?

Q. Yes.

A. Yes.

Q. As the names were taken out or called out, and the tickets examined by the clerk and entered on a list were they not?

A. I was under the impression that they were simply called out to him. They may have been handed to him.

Q. Don't you know, Mr. Barnes, that the names entered on the lists are always by the clerk examined when they are called out first by the judge; they are handed over to the clerk who compares them to get the spelling right and the initials right when he enters them on the list?

131 A. No. I never had noted that part of it.

Q. You don't state that it was not done in that way?

A. No, I do not.

Redirect examination by Mr. ROSE:

Q. Did you personally ever give the key to the box for the eastern division to the jury commissioner or the clerk, for the purpose of revision, during your time of office?

A. No.

Q. What is the name of your chief deputy?

A. R. D. Locke.

Q. Locke?

A. L-o-c-k-e.

132 LENOIR M. ERWIN, a witness called on behalf of the defense, being duly sworn, testified as follows:

Examined by Mr. ROSE:

Q. Mr. Erwin, where do you reside?

A. Macon, Georgia.

Q. What, if any, official position do you hold under the United States Government?

A. I am deputy clerk of the circuit and district courts of the United States, and United States commissioner for the southern district of Georgia.

Q. Who is the clerk of the district court?

A. H. H. King.

Q. Where does he reside?

A. In Savannah.

Q. From 1897 to the 1st of January 1900, tell me, if you know, who was jury commissioner for the southern district of Georgia?

A. For the eastern division?

Q. For the eastern division of the southern district of Georgia?

A. I remember one jury commissioner, Col. Screven, of Savannah.

Q. What is his first name?

A. I can't recall his initials.

Q. During that time was he jury commissioner?

A. I think he was appointed several years ago, sir. I don't remember.

Q. Do you remember Mr. Elliott having been jury commissioner?

A. I think he was the last.

Q. When did his term of office begin?

A. A year or two ago, sir.

133 Q. Was he the jury commissioner in 1899?

A. I am not sure, sir, but my impression is that he was.

Q. Prior to November 22nd 1899—no, on November 22nd 1899, did you have possession of the grand-jury box for the eastern division of the southern district of Georgia?

A. I had.

Q. Where did you have it?

A. At Macon, Georgia.

Q. In what part or place; whereabouts in Macon, Georgia?

A. I had the grand-jury box in my office at Macon, and also in the United States court-room in the Government building.

Q. That was at different times during that day?
A. Yes, I had the box I think the day before.
Q. Both in the court-room?
A. No sir, in my office.
Q. When did you receive that box?
A. I am not sure, but a day or two before the grand jury was drawn.
Q. Do you recollect the date when the grand jury was drawn?
A. November 22nd 1899.
Q. Mr. Barnes testified that it was about noon. Is that your recollection?
A. My recollection is that it was between 12 and 1 o'clock.
Q. How did you receive the box; from whom?
A. From the clerk at Savannah, sent by express.
Q. Who personally delivered it to you; physically delivered it to you?
A. I do not remember, but I think either I receipted the express deliveryman for the box or Mr. Cecil Morgan the deputy clerk of the circuit court.
134 Q. Receipted for it?
A. Yes.
Q. What express company?
A. Southern Express Company.
Q. That would be about the 20th day of November?
A. It was a day or two before the grand jury was drawn.
Q. How long before that time had you had that box in your possession?
A. I had not had that box in my possession for perhaps nearly a year.
Q. Did you have it in your possession in March or April of 1899?
A. I don't remember, I may have.
Q. Do you recollect whether there was a grand jury drawn in March or April 1899?
A. I cannot recall the fact sir.
Q. When was a grand jury drawn for the eastern division of the southern district of Georgia prior to the one drawn on the 22nd of November 1899?
A. I do not remember, sir. A grand jury may have been drawn at Macon or it may have been drawn in Savannah.
Q. I mean at Macon by you or in your presence?
A. I do not remember, sir.
Q. Had there been one drawn there within the year to your best recollection?
A. I could not state positively, Mr. Rose.
Q. What is your best recollection about it?
Mr. Erwin: Wait a minute. Now he states that he isn't positive about it, and he is not what you would call the resident
135 deputy at Savannah, and therefore he could not be able to testify at all.

Mr. ROSE: I am not asking him about Savannah. I am asking him about Macon.

Mr. KELLOGG: He knows all about that, or ought to.

Mr. ERWIN: Go ahead.

A. I can state this, that on other occasions the grand jury——

Q. No; prior?

A. Yes, on other occasions prior to November 22nd 1899, the grand jury and petit jury was drawn at Macon for Savannah.

Q. And at those times you had the box in your possession?

A. Yes sir.

Q. After the drawing prior to this one of November 1899, the box was locked, was it?

A. It was.

Q. By whom?

A. By the judge, according to my recollection.

Q. And delivered to whom?

A. It was sealed and delivered to me.

Q. And what did you do with it?

A. I sent it back to Savannah.

Q. By express?

A. My recollection is that I sent it back by express.

Q. Were you ever present from 1897 down to the 1st of January 1900, at any time when the jury commissioner and the clerk of the court put any names in the box? I am now referring to the box for the eastern division.

136 A. I was not, sir.

Q. Is there a box for the western division as well as for the eastern division?

A. Yes sir; there are two boxes.

Q. The box for the western division is kept at your office at all times?

A. At my office in Macon.

Q. At all times?

A. At all times. Possibly they may have been sent down to Savannah on one or two occasions and the western-division juries drawn there, but I don't remember anything about them.

Q. How many names were in that box, if you know, when the drawing began on the 22nd of November 1899?

A. I do not know, sir.

Q. Before the drawing began, was there any examination of the box or its contents to ascertain how many names there were in it?

A. No sir; there was not.

Mr. ERWIN: Wait a minute now. I will object to that question because you stated before.

Mr. ROSE: I mean by "before" after you had received it; a day or two before the opening.

A. Not after I received it. Of course I don't know what transpired before that.

Q. Who was present on the 22nd of November 1899, when the grand jury was drawn?

A. Hon. Emory Speer, judge of the district court, Marion Erwin, United States attorney, John M. Barnes, United States mar-
137 shal, J. N. Tally, stenographer, and myself, and the bailiffs of the court.

Q. Who drew the names from the jury-box; whose hand was it?

A. Judge Speer's.

Q. After drawing the names, did you receive the tickets?

A. The judge handed them over to me as he drew them.

Q. As he drew them?

A. Yes.

Q. All of them?

A. Not all of them.

Q. Not all of them?

A. No sir.

Q. How many was drawn and handed over to you?

A. Thirty-five.

Q. What was done with the slips taken from the box after they were handed over to you, of the 35 names selected?

A. My recollection is that I placed them in an envelope and marked them.

Q. Did they go back into the jury-box?

A. They did.

Q. In an envelope?

A. That is my recollection.

Q. The judge did not announce to you, or give to you all the tickets that he drew from the box, did he?

A. He did not.

Q. What was done with those tickets?

A. My impression is, as well as I can recall, that the judge put those tickets back in the box.

Q. Himself?

A. Himself.

Q. Can you tell how many there were of them so put back by him?

A. I do not know, sir. I suppose there must have been 15 or 20, I did not count them.

138 Q. You did not have them in your hand at all?

A. I did not have them in my hand at all.

Q. You did not seem them to read them?

A. I did not see them to read them. I saw him take them out and call them off.

Q. You saw these 15 or 20 taken out by the judge and called?

A. I do not say positively there were 15 or 20.

Q. Well, about 15 or 20.

A. I say I am guessing at it.

Q. They were taken out and called.

A. I don't think the judge called the full name of these slips, but my impression is that he called, as he pulled them out, he called the county.

Q. Called the county without the name of anybody?

A. That is my impression.

Q. And kept them under his control until they went back into the box; did not turn them over to you, at least?

A. He did not.

Q. And you made no list of them?

A. I made no list of them.

Q. And there was no list made there by any one of them?

A. Not that I know of.

Q. Have you in your office rules governing the drawing of juries?

A. We have a compilation prepared by Mr. Cecil Morgan, deputy clerk of the circuit court.

139 Q. Do they cover or include rules governing the drawing of juries; does that compilation cover the rules for the drawing of juries in the district court as well?

A. Yes sir.

Q. And those are the rules under which the juries are drawn in the district court; that compilation is treated there as an authority, isn't it?

A. It has never been revised by the judge.

Q. Well, are the rules correctly set out in here (referring to book)?

A. They are not entirely accurate, sir.

Q. Are the rules in relation to the drawing of juries set out in here?

A. They are set out but not entirely accurate.

Q. So far as they go, I mean. Do you mean they have been amended since 1897?

A. I mean that in one of the rules recorded in that book that there is an order of court—a special order—passed for the revision of the jury-boxes for the eastern division that is incorporated in a rule which was passed many years subsequent to the adoption of that rule.

Q. Is that one of these revisions that you speak of (showing book)?

A. Yes sir; that is one.

Book marked for identification "H 5" S. H. October 17th 1900.

Mr. ERWIN: I object to this line of questioning and any endeavoring to prove a rule of court in the district court by a com-

140 pilation made by the deputy clerk of the circuit court. The only competent way to prove that matter would be by a certified copy of the rule of the court, which is of course entered in the records of the court. I do not make this as a captious objection, but I make it because I know that on the very point that the learned counsel is endeavoring to base this examination, that compilation is wrong and materially wrong.

The COMMISSIONER: Then we will have to have a certified copy of the rules. You say you know they are wrong?

Mr. ROSE: I am going to show the one he refers to in this, may it please your honor, and as I understand it, and have insisted in this case, a certified copy of a paper is not evidence here and cannot be produced before you.

The COMMISSIONER: Then they will have to produce the original that is all.

Mr. ROSE: That is another question.

Mr. KELLOGG: They are not going back on their printed rules of court?

Mr. ROSE: If he says they are correct, I am satisfied.

The WITNESS: In the main they are correct, but in one or two particulars they are incorrect.

Q. The part that you have referred to, with reference to
141 the order about the revision of the jury, reads as follows; in this compilation: "It appearing to the court that there is a necessity for a revision of the jury of this court for the eastern division, it is upon consideration ordered that the jury commissioner and the clerk of this court, conformably to law, shall proceed as soon as may be to revise the jury-list of said court, and for the purpose of convenience and economy in serving said jurors, it is ordered that the jurors be selected from the counties of Chatham, Bryan, Liberty, Ware, Glynn, Wayne, Pierce, Clinch, Lowndes, Brooks, Thomas, Decatur, Effingham and Bullock. January 26, 1897." Is that the part of this compilation which you say is not correct?

A. The order is correct but it is no part of that rule.

Mr. ERWIN: Wait a minute. Did you ever see the original order?

Mr. KELLOGG: We don't wish him to be asked any questions. He is your brother and the clerk there. You can cross-examine.

Mr. ERWIN: It is a preliminary question to undertake to prove——

The COMMISSIONER: I am not allowing them to prove. I have sustained your objection that the original order is the proper one. Now if you consent that a certified copy be put in place of the original that will obviate bringing the original here.

Mr. ERWIN: Let me state my position, may it please your
142 honor. That particular order to which he refers on its face shows that it is no rule. A rule of court is something to mark out a continuous course of action. That purports to be a particular order directing certain officers to do a certain thing at a particular time, which I presume was done, and that order is a correct copy. It was an order made in the eastern division of the district, and the deputy now under examination residing in the western division, two hundred miles away; and they are undertaking to prove that particular rule of court, may it please your honor. It had no business in the compilation as a rule of court, and that compilation is not a compilation made by even the deputy clerk of the court under consideration, and while there may be such an order in Savannah, and probably was a particular order about the revision of the jury-box at a particular time in 1897, it is not a rule of court and cannot be proved a rule of court in that kind of a slack way.

Mr. KELLOGG: This man can say whether he knows about it. This is what they use down South all the time.

Mr. ERWIN: I asked whether he ever saw the order.

The COMMISSIONER: Did you ever see the order?

Q. Did you ever see the original order?

Mr. KELLOGG: The idea that they should reject the rules of their own court.

143 The COMMISSIONER: They don't reject the rules. They are right in their objection that nobody knows whether it is an authentic copy of the rules of court or not. I don't know my own rules. I can say it was done under my direction.

Mr. KELLOGG: That is what you have done right along.

The COMMISSIONER: No; I have not. There may be errors of the printer in there.

Mr. ERWIN: I asked him whether he ever saw the original order.

Mr. KELLOGG: I object to it as interfering with the cross-examination.

The COMMISSIONER: I sustain the objection. Go on.

A. I don't recollect to have seen——

The COMMISSIONER: You are not answering the question now.

Mr. ERWIN: I object to that testimony that is in until it is proved that he has seen the original of which that is a copy.

The COMMISSIONER: Yes: you can bring that out on cross-examination.

(By Mr. ROSE:)

Q. Mr. Erwin, in the compilation marked Exhibit "H 5" of this date for identification, on page 25 is the heading "juries." Following that are what purports to be five rules numbered from

144 80 to 84, inclusive. In No. 80 is this paragraph that I read to you with reference to revising the jury-list, and directing it to be drawn from certain counties. You recall that paragraph, do you?

A. Are you sure it is 80?

Q. Yes. Are you able to say whether this revision correctly contains the rules in relation to juries, except that paragraph, that are in force in the district court?

A. Will you let me look at it?

Q. I will, sir.

(Book shown witness.)

A. There is another order here that appears to be incorrectly incorporated in this compilation, dated April 7th, 1897. That is the order providing for the drawing of the juries for the western division of the southern district. There is no part of rule 80, or numbered 80, in this book.

Q. Now will you answer the question then, with the exception of the two orders that appear at the end of rule 80, one dated January 26th 1897, and the other April 7th 1897, which you say are orders and therefore not part of that rule, are the rest of the rules correct?

A. Yes, sir; I think so.

Mr. ROSE: Now I will offer in evidence those rules numbered 80 to 84 inclusive, except the two orders dated January 26th 1897 and April 7th 1897.

Mr. ERWIN: I desire to cross-examine the witness on that particular order.

The COMMISSIONER: Go ahead.

(By Mr. ERWIN:)

145 Q. This order incorporated under what purports to be rule 80, starting out: "It appearing to the court that there is a necessity for a revision of the jury of this court for the eastern division," &c. dated January 26th 1897, did you ever see that original order?

Mr. ROSE: To that I object, because I have not offered that in evidence. It is not cross-examination. I have offered all the rules identified by the witness excluding that particularly that he is now reading.

Mr. ERWIN: I just want to ask him that.

The COMMISSIONER: Ask him that.

Q. Did you ever see that original order to your knowledge?

A. Not that I can remember, the original order. I presume, however, that there was such an order.

Mr. ERWIN: I am not asking you what you presume and I move to strike out your presumption.

The COMMISSIONER: Strike it out.

Mr. KELLOGG: That is a mode of stating his recollection.

The COMMISSIONER: If it is his recollection it is all right. It don't go physically out anyhow.

Q. You are not the resident deputy at Savannah in the eastern division?

A. I am not.

146 Q. Have you compared the balance of this, of what purports to be rule 80 in this book, have you compared it with the original order in the records of the court?

A. I have not.

Q. You have not?

A. No. Well, I have compared that with an old book that we had. I will say that much.

(By the COMMISSIONER:)

Q. I don't understand what you mean. By an old book of rules you have printed?

A. Yes sir; an old printed rule book. This is a new compilation.

(By Mr. ERWIN:)

Q. Mr. Cecil Morgan is not deputy clerk of the district court?

A. He is not.

(By the COMMISSIONER:)

Q. Under whose direction is that rule made?
A. He got it up on his own motion.

(By Mr. ERWIN:)

Q. Who do you say; who do you mean by "he"?
A. I mean the deputy clerk of the circuit court, Mr. Morgan.
Q. This compilation was not officially approved by the court by any order of which you have any knowledge?
A. Not that I know of.

The COMMISSIONER: I think this can be cured in this way, if Mr. Erwin consents to it. That the witness send us up a certified copy of these rules. There is no use of bringing the originals here if he consents to a certified copy.

Mr. ERWIN: I have no objection to making a statement
147 right now if it is satisfactory to these gentlemen here. I desire to state that in the district court where this indictment is found, that there is a rule passed by the district judge himself of course regulating in general the drawing of the jury, in general times as provided in this rule 80, leaving out these special orders which the court makes from time to time.

The COMMISSIONER: What I do not clearly understand is this. Your point is that orders are not rules?

Mr. ERWIN: Yes.

The COMMISSIONER: I do not see how they got in that book there.

Mr. KELLOGG: It is an order amending a rule.

The COMMISSIONER: Unless it is some order amending the rule.

Mr. KELLOGG: That is just what it is.

Mr. ERWIN: What I want to state in reply to that is, wherein this rule is wrong, because he has incorporated in here particular directions for the doing of a thing, which, when done, ends it. A rule of court, as I understand it, is something to guide the court or lawyers or officers of the court in a certain line of conduct, and of course the district-court rules are subject to modification by the district judge and change, in so far as he is competent to make
148 them; and certain special orders in regard to revising the jury-list in Savannah — 1897 were made. Probably this order of January 26th may have been a special order for the clerk and jury commissioner made at that particular time to revise that box. If it was it was not a rule of court controlling anything but a special order, and the balance of that rule to which Mr. Rose refers here was substantially adopted by the district judge many years ago and has been modified from time to time by special orders in regard to the revision of the boxes and the drawing of jurors at the particular time.

Mr. ROSE: Now, Mr. Commissioner, will the prosecution admit that that rule as contained in this book in relation to juries, numbered 80, leaving out the orders of January 26th 1897, and of April 7th 1897, was the rules adopted by the district court.

Mr. ERWIN: It was a rule adopted by the district court several years prior to that time.

Mr. ROSE: Prior to what time?

Mr. ERWIN: Prior to November 22nd 1899; probably seven or eight years, or ten years or longer, prior to that time.

Mr. ROSE: And in force in 1899?

Mr. ERWIN: And it was in force, except as modified by the special order of the judge made in any particular case and by
149 his special orders in the drawing of jurors at particular times.

Mr. ROSE: Then is this the order originally adopted by the judge and in force at the time of this compilation in 1897, and continued in force to the 1st of January 1899, except as modified by special orders passed or entered by the judge?

Mr. ERWIN: Except as modified by orders of the judge, whether special orders or not.

Mr. ROSE: I don't say special orders. I say except as specially modified.

Mr. ERWIN: Yes, I think so. The part of the rule to which you refer was originally adopted by the Hon. John Erskine, the district judge, in 1880. That is my recollection of the matter. I mean that part of the rule in regard to the manner of the drawing of the juries.

Mr. ROSE: All prior to those two orders, as appears in this book.

Mr. ERWIN: Yes. It has been in general carried out up to this time, and up to the present time in regard to the drawing of the juries.

Mr. ROSE: All right. Now that is admitted, as I understand it. Now, your honor, let us have that marked in evidence with that statement. The book is marked and the rule 80 appears here*a*.

Mr. ERWIN: Of course I want to add to that that the draw-
150 ing of the juries in open court has always been during Judge Speer's time, carried out by the judge drawing them in open court himself.

Mr. ROSE: I don't care about that. That is no part of this admission. There is no order about it or anything of the kind. That is what I want.

Mr. ERWIN: There is an order, for instance, just prior to the drawing of this particular grand jury.

Mr. ROSE: We will get that by and by. I know what you want, but I want to get things in order and shape.

Mr. ERWIN: I have stated it I think substantially.

Mr. ROSE: Will you admit that the paper correctly sets forth the order of January 27th, 1897?

Mr. ERWIN: I have never seen that order and therefore don't know whether it is correct. I cannot admit it is correct, although it probably is correct.

Mr. ROSE: Will you admit that the order set out under date of April 7th 1897, in this book, is correctly set out in this book?

Mr. ERWIN: I don't admit that, because I don't remember the terms of the specific order in question, and cannot admit it.

151 Mr. ROSE: Then I will have to supply that in some way.

The COMMISSIONER: Suppose Mr. Erwin sends up a certified copy and it can be used in lieu of the original.

Mr. ERWIN: I have no objection to certified copies of anything, in so far as the waiver of the original being produced, but whether it is admissible on other grounds, that is a question.

Mr. ROSE: Of course we can consent to put in any paper that we want to, whether it is legal evidence or not, but I don't wish to be foreclosed from the point that I have made that the indictment offered in evidence being a certified copy of the indictment, is no evidence and cannot be admitted here, by myself putting in a certified copy of a paper.

Mr. ERWIN: I don't object to your putting in a certified copy of that order, reserving your rights on other matters.

The COMMISSIONER: That will cover it.

Mr. ROSE: Then it is admitted that rules 81, 82, 83 and 84 are correctly set out in this compilation? I mean all the rest of them under the head "juries."

Mr. ERWIN: I admit that what purports to be rules 81, 82, 83 and 84 were rules originally adopted by Hon. Judge Erskine in 1880, the judge preceding Judge Speer—that is, of the district court,

152 Judge Erskine presiding—but I state that these rules were modified by certain orders in regard to drawing the juries at certain terms of the court since that time; namely, the special order made directing when the juries were to be returned, when the venires were to be issued, and all case, in every case.

Mr. KELLOGG: Why not take these in subject to comparison with the original. It will save trouble, and you will be at liberty to do it.

Mr. ROSE: These two orders of January 26th and April 7th 1897?

Mr. ERWIN: No, I don't want those in.

(By Mr. ROSE:)

Q. Mr. Erwin, have you seen the original of the order of April 7th 1897?

A. I don't remember that I ever saw it. I may have.

Mr. KELLOGG: It is understood that a certified copy of this order may be introduced with the same effect as the original.

Mr. ERWIN: The same as the original, of course, subject to any objection which might be had to the original if it were here.

Mr. KELLOGG: Oh, yes.

Mr. ROSE: Now let these rules with these admissions be marked in evidence and taken in the record.

153 Received as Exhibit "H 5" of this date, reading as follows:

80.

The full names of persons selected by the clerk and jury commissioner from whom jurors are to be chosen, together with the names

of the counties in which they reside, respectively, shall be written each on a separate slip of paper, and also entered into a book to be kept by the clerk; every slip before being placed in the box shall be so folded up that neither the name nor county within it can be seen; said box shall be sealed and locked by the judge of the court; the box shall be kept by the clerk and the key thereof by the marshal.

During every regular term of the court the grand and petit jurors for the next succeeding regular term shall be drawn as follows: The said box shall be brought into open court, and the seal thereof be broken and the box unlocked by one of the judges of the court who shall, also in open court, cause to be drawn therefrom not less than sixteen nor more than twenty-three persons to serve as grand jurors, and not less than fifteen nor more than thirty-six persons, the precise number to be fixed by the judge, to serve as petit jurors. When a slip is drawn from the box, the name thereon shall be audibly announced and shall be entered on the venire or a paper at-
154 tached thereto. After every drawing and after every deposit of new names therein, the box shall be sealed and locked by the judge, and he shall deliver the box to the clerk and the key to the marshal.

If grand or petit jurors or both are required for any adjourned or special session of the court, or if from failure to draw or from any other cause, there shall be at any term of the court a deficiency in whole or in part of regular jurors, the court may provide such grand or petit jurors or supply such deficiency by drawing a sufficient number of names for that purpose from the box, which drawing may be made in open court, as hereinbefore provided, or in vacation in the presence of the judge of the court and the clerk or his deputy; the marshal or his deputy; the district attorney or assistant district attorney, and the jury commissioner and such other persons as may choose to be present not less than three. If the court should sit at any regular term, the jurors drawn for that term shall stand over for the next term that shall be held.

The marshal shall summon jurors by delivering to each personally or by leaving at his usual residence, a written or printed summons.

81.

At least thirty days before the next term of the court the
155 clerk shall make out and deliver to the marshal a venire directing the marshal to summon all the persons drawn, as mentioned in the preceding rule—unless the judge otherwise direct—to attend as jurors at such term.

82.

To all writs of venire the marshal or his deputy shall make a return to the clerk, exhibiting in three several columns those jurors on whom a summons has been served personally, whose who have been summoned by copies or notices left at their houses and those who could not be found.

83.

The marshal in his summons to each juror shall express the day, hour, place and court at which he is to appear.

84.

In challenging jurors not more than one minute shall be allowed either party for each challenge.

156 Exhibit "I 5," S. H., October 23rd, 1900, reading as follows:

Ex. I 5. S. H. Oct. 23, 1900.

In the District Court of the United States for the Eastern Division of the Southern District of Georgia.

In re Revision of the July List.

It appearing to the court that there is a necessity for a revision of the jury of this court, it is upon consideration ordered that Edward S. Elliott be and he is hereby appointed jury commissioner of this court for the eastern division of the southern district of Georgia, and it is ordered that the said Edward S. Elliott and H. H. King, clerk of this court, conformably to law, shall proceed as soon as may be to revise the jury-list of said court, and for the purpose of convenience and economy in serving said jurors, it is ordered that the jurors be selected from the counties of Chatham, Bryan, Liberty, Ware, Glynn, Wayne, Pierce, Clinch, Lowndes, Brooks, Thomas, Decatur, Effingham and Bulloch. January 26th, 1897.

EMORY SPEER, *Judge.*

Endorsement: District court of the United States, eastern division, southern district of Georgia. *In re* revision of July list and boxes. Order. Filed January 26, 1897. S. F. B. Gillespie, deputy clerk.

157 I hereby certify that the above is a true and correct copy of the original order for revision of jury list, now of file and record in my office.

Seal U. S. District Court, Southern District of Georgia.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Savannah, Georgia, this 15th day of October, A. D. 1900.

H. H. KING, *Clerk.*

158 Cross-examination by Mr. ERWIN:

Q. In making up the names for the jury-box—the clerk and the jury commissioner—on what are the names that go into the box written?

159 Mr. ROSE: He has not proved that he makes them up.

Q. If you know?

Mr. ROSE: I object to that now unless it is confined to the eastern

district. He won't let this order in because he is not the clerk of the eastern district.

Mr. ERWIN: He saw the names drawn from the box and can tell what they did.

Mr. KELLOGG: That is not what he asked. If he wants what he saw drawn from this box all right.

Mr. ERWIN: I am asking whether they were written on little slips of paper.

Mr. KELLOGG: You have given what would be the correct evidence, the description of the cards he saw taken out of the box, but the question of what was the custom of making out the tickets, that we have no right to have.

Mr. ERWIN: I didn't ask him about the custom.

(By the COMMISSIONER:)

Q. What was on them? You saw them drawn out?

A. I saw them.

(By Mr. ERWIN:)

Q. What were the names on?

A. Slips of paper.

Q. What was on the paper, what appeared on the paper?

A. The name of the juror selected and the county in which he lived.

(By the COMMISSIONER:)

Q. Was their residence on there?

A. The county.

160 Q. Was their residence on there, of a certain place; certain street number I mean?

A. Oh, no sir.

(By Mr. ERWIN:)

Q. What was on the little slip of paper was the name of the juror and the county in which he resided?

A. It was.

Q. Many of the jurors resided in the country not being in any town, did they not?

A. They did; some in the city and some in the country.

Q. Now how were these slips fixed in the box; were they or not folded?

A. Are you speaking of——

Q. The slips containing the names and the county of the juror, how were the slips put in the box, were they open or folded.

Mr. ROSE: He don't know anything about it.

Q. How were they when you saw them in the box? You saw them in the box?

A. When they were taken out they were folded.

Q. They were folded before they were taken out, don't you mean? You don't mean they were taken out and then folded?

A. They were folded when they were put in, I presume. I didn't see them put in.

Q. You used an expression that was ambiguous. When they were taken out they were folded might mean they were folded when they were taken out, but when they were taken out of the box what was the condition?

A. Folded.

Q. They were folded before they were taken out and at the same time they were taken out they had already been folded?

A. I saw them when the box was opened, and they were
161 folded.

(By the COMMISSIONER:)

Q. They were folded then?

A. Yes.

(By Mr. ERWIN:)

Q. Were they folded with the names and the county of the jurors folded on the outside, or on the inside?

A. On the inside.

Q. When this drawing took place, it took place in open court, did it not?

A. It did.

Q. The judge was on the bench?

A. He was.

Q. The jury-box for the district was brought in and placed before the judge, was it not?

A. It was.

Q. At the time the box was brought in it was not only locked, but it had over the keyhole a piece of paper pasted with the judge's name written across it, and each corner sealed with sealing wax with the judge's seal on it, was it not?

A. I don't remember whether the paper had on it the name of the judge, or the name of the jury commissioner and the clerk, but the paper was on it and it was sealed.

Q. Sometimes you mean when the boxes are opened they do have the name- of the jury commissioner and clerk on them, and sometimes they have the name of the judge on them. Now under what circumstances does the box have the name- of the jury commissioner and the clerk on it, and under what circumstances does it have the name of the judge on it?

162 Mr. ROSE: I object to that. If he saw it put on, he can tell, but it is the seal of this box that is in question.

Mr. ERWIN: It is cross-examination.

The COMMISSIONER: He may answer it if he knows.

(By the COMMISSIONER:)

Q. Did you see them put it on yourself?

A. I did not.

Q. Never saw the judge or clerk put it on?

A. You mean when it was—before it was sent to Macon?

Mr. ERWIN: The question I am asking the witness, may it please your honor, is with reference to the answer that he don't remember positively whether it was the judge's name or the clerk and jury commissioner's, and I ask him why does he make that answer.

The WITNESS: Shall I answer that?

The COMMISSIONER: Yes, answer it.

Mr. KELLOGG: He can't give his reason for making that answer.

Mr. ERWIN: He can state facts which make him say that.

Mr. KELLOGG: That is not a fact, why does he remember.

The COMMISSIONER: He is the deputy clerk of the court.

Mr. KELLOGG: He can tell whether the seal was on.

163 The COMMISSIONER: And he can tell why it was left off, if it was.

Mr. KELLOGG: He is not asked that question. I don't think it calls for any fact.

The COMMISSIONER: Answer the question.

Exception taken.

A. I say that after a box is revised by the clerk and the jury commissioner, that it remains locked and sealed, and upon the paper which seals the box is entered the name- of the clerk and jury commissioner who revised the box.

(By Mr. ERWIN:)

Q. Now go on.

A. After the box is——

(By the COMMISSIONER:)

Q. After you have drawn your jury and the box is locked up, what then?

A. After the jury is drawn and the box locked up, then the judge places a paper over the box and seals it and writes his name on it.

(By Mr. ERWIN:)

Q. What you mean to say then is, you don't recollect whether this was the first drawing after the revision of the box, or whether there had been preceding drawings, and therefore you can't tell whether the judge's name was on it or not?

Mr. KELLOGG: That is pretty tough.

The COMMISSIONER: I want to get light on it myself.

Mr. KELLOGG: Yes; but I don't want him to put the answers in his mouth. That is Erwin, district attorney, not Erwin, clerk.

164 Mr. ROSE: He says he don't remember whether it had the judge's name on it or clerk and jury commissioner's.

Mr. ERWIN: They have gone into the question as to how the box was revised, and I have a right to explain how it was.

Mr. ROSE: He wasn't present when it was revised and never saw the box revised in his life, and I haven't asked him anything about the revision of the box.

The COMMISSIONER: He may be making him his witness to a certain extent.

Mr. KELLOGG: He can't make it out by custom.

Q. (Question read.)

Mr. ERWIN: The judge's name or the jury commissioner's name?

A. That is what I mean to say; that I don't remember whether that was the first drawing after the box was revised or whether it was some subsequent drawing to the first.

(By the COMMISSIONER:)

Q. Now right here, do I understand the practice down there to be that every time a jury is drawn the judge puts his name over the keyhole of the box?

A. Yes sir, after it is drawn and the box is locked and there is a piece of paper——

Q. I understand you draw a jury out?

A. Yes sir.

165 Q. Now do I understand that after you draw the jury out that the judge puts a piece of paper over the keyhole of the box?

A. Yes sir; the paper is handed to the judge by the clerk or by the marshal, and he writes his name across it.

Q. And puts it over the keyhole?

A. And puts it over the keyhole.

Q. Is that done at every drawing?

A. Done at every drawing.

Q. You talk about a subsequent drawing. I don't understand whether it is the first drawing or a subsequent drawing?

A. I say I don't know whether that was the first drawing after the revision of the jury-boxes, or whether it was some subsequent drawing.

Mr. ERWIN: If the jury-boxes had been revised by the clerk and jury commissioner they put their names on the box and on the first drawing their names would be there, but if after the first drawing the judge having opened the box, he would put his name on it and it would be on it afterwards.

The COMMISSIONER: I understand now.

(By Mr. ERWIN:)

Q. Can you state what the position of the judge was and what was your position at the time of the drawing of the jury with reference to the position you were at the bench?

A. The judge was sitting on the bench, I was about two feet and a half to his right, sitting also on the bench.

Q. You mean with the rostrum or table in front of you?

166 A. I mean to the judge's right; the judge was to my left.

Q. Then where was the jury-box?

A. The jury-box was in front of the judge on the stand.

Q. Now when the names were taken out of the box what was done; just explain how it was done?

A. The judge drew the names from the box consecutively, and those that he desired me to enter on the list he called out and handed to me and I entered them on the list.

Q. Before the drawing was entered upon, was there an order of the court made?

A. There was.

Mr. ROSE: In relation to what?

Mr. ERWIN: In relation to the drawing.

A. There was an order.

Q. Have you a certified copy of that order in your possession?

A. I have.

Q. Where is it?

A. Here.

(Paper produced by witness.)

Q. Is that the order?

A. That is a certified copy of the original order.

Q. That is a true copy of the original order?

A. It is.

Q. You know it from personal inspection?

A. It is.

Mr. ERWIN: I ask to have this certified copy of the order marked exhibit for identification.

Marked Exhibit 327, S. H., for identification. October 17th 1900.

167 Mr. ROSE: I object to it, as it appears on its face to be incomplete. It does not state at what court it was entered, or the papers upon which it was entered. It refers to something annexed, which is not annexed, and it is not an order but an extract from the minutes, according to this paper. "Upon consideration of the annexed notice." If they put the whole thing in I don't object to it.

Mr. ERWIN: I will state that I have written for a certified copy of the motion and order, but I did not get it when I wrote for it before.

Mr. ROSE: Then hold this until you get that.

Mr. ERWIN: I will put this in now. It is the whole order. There was a motion made on which the order was founded.

The COMMISSIONER: I suppose you will have the whole of it to take the place of that.

The WITNESS: I should correct my testimony in that respect and say that that is an extract from the minutes. It appears to be.

Q. I call your attention to this language in that order: "Upon consideration of the attached notice from the United States attorney, and the matters therein stated it is ordered by the court that a grand jury be drawn from the jury-boxes of the eastern division of the district and summoned to attend the session of the court to be holden in the city of Savannah on December 4th, 1899, and
168 that said jurors be returned from the counties of said eastern division other than the counties of Chatham and Glynn, it

appearing to the court that such return of jurors will be most favorable to an impartial trial and prevent the incurring of unnecessary expense." Now you stated about the judge handing over certain of the tickets containing the names of jurors to you, and not handing over certain ones drawn to you. Now do you know the counties, *which of* the jurors so taken out were not handed over to you?

A. I do.

Q. What counties were they?

A. Chatham county and Glynn county in the southern district of Georgia.

Q. When the judge drew a name——

Mr. ROSE: Let him state, won't you, Mr. Erwin?

Mr. ERWIN: He is your witness, and I have a right to lead him if I choose to do so.

Q. When the judge drew a ticket out did he call out in every case the county of the jurors from the ticket, as he held the ticket up before him?

A. What slips do you refer to?

Q. The slips drawn out of the box, in every case did he call out the county of the jurors as the name was drawn?

A. My recollection is that he did.

Q. And when the names were Chatham and Glynn he did not hand the tickets over to you, and when they were other names he did hand them over to you?

Mr. KELLOGG: He didn't say that he saw them. He said
169 he didn't see the names on the papers. How can he tell? The question calls for something the witness could not know because he didn't see the tickets that were not handed to him.

The WITNESS: I said I did not see the names on the Chatham and Glynn county slips. I did on the others; scanned them each one as they were handed to me.

Mr. ERWIN: He said also that the judge called out the counties of Glynn and Chatham and laid them aside.

Q. That is true, isn't it?

A. My recollection is that he called out the counties of Chatham and Glynn and put them in the box; after he had taken them out, put them back in the box.

Q. Whenever he took a name from the box in which the residence of the ticket as called out was Chatham or Glynn, he returned that to the box?

A. He did, as I recall.

Q. But whenever the name drawn was of other counties of the eastern division, he handed the ticket over to you and called out the full name and you took the ticket and wrote it on your list?

A. That is my recollection.

Q. After that list was completed, then there was an order made in regard to issuing a venire, was there not?

A. There was.

Q. And then the venire for the summoning of the grand jury was issued.

Mr. KELLOGG: Well, we ought to have those papers.

170 Mr. ERWIN: I am not going into it. You are the men that should have brought those here if you are attacking the record. I am going to show that these are matters of record.

Mr. KELLOGG: You can't show it was a venire without producing it.

The COMMISSIONER: You can ask him what the fact is.

Mr. KELLOGG: He cannot.

The COMMISSIONER: He can and I will allow it and you can take your exception.

Mr. KELLOGG: You won't allow it without hearing me.

The COMMISSIONER: It is to save time.

Mr. KELLOGG: Now he is asking for the contents of it.

The COMMISSIONER: He is asking whether a venire was issued, and that is a simple fact.

Mr. KELLOGG: But that depends upon the — in which it was issued.

The COMMISSIONER: When he goes into the contents of it he has to produce it.

Mr. KELLOGG: You can't tell whether a venire was issued until you see it.

The COMMISSIONER: He can tell as deputy clerk of the court. I can tell.

Mr. KELLOGG: You can tell whether a paper is issued with the word "venire" on the back of it.

171 The COMMISSIONER: He can tell whether a venire is issued as clerk of the court.

Mr. KELLOGG: I object to the question as calling for the contents of the paper.

The COMMISSIONER: And I overrule it and give you an exception. Was a venire issued. That is the question.

A. It was.

Mr. ERWIN: What I am endeavoring to show is that these are matters of record, and he is undertaking here to prove by parole a lot of things that ought to be proved by record evidence. That is the purpose of my examination.

Mr. ROSE: I haven't asked him anything about the issuing of the venire or anything else.

Mr. KELLOGG: You are making him your witness.

The COMMISSIONER: He has answered a venire was issued, but you can't go into the contents of it unless produced.

Mr. ERWIN: They have undertaken to tell how many names were entered on that venire.

Mr. ROSE: I haven't any such thing.

Mr. ERWIN (continuing): How many names were handed over on the list, and the list itself is a part of the venire, and all these are record evidence and I am trying to show it was record evidence and

that they ought to produce the record evidence and not un-
172 dertake to go into it by parole.

Mr. ROSE: Now what I have proved by this witness does not appear on any record. I have proved that the hand of the judge took the tickets out of the box, that when he, in his own mind or from his sight, saw fit to reject one, he did it. Does that appear of record? Is there any record of that kind?

The COMMISSIONER: No; that is a fact.

Mr. ROSE: That is a fact and that I can prove, and by so doing I am blameworthy for calling these men here.

The COMMISSIONER: You have a right to prove what actually took place in the presence of the witness.

Mr. ERWIN: Then that presumptively took place, when the record shows that the judge ordered the doing of the very thing he has proved.

Mr. KELLOGG: You say the judge made an order?

Mr. ERWIN: The order speaks for itself.

Redirect examination by Mr. ROSE:

Q. Mr. Erwin, you answered a question of the district attorney's that on the 22nd of November that the jury-box of the district court was in the court-room at Macon?

A. I did.

Q. Do you mean by that to have us infer or understand
173 that there was only one jury-box for the district court for the southern district of Georgia?

A. I mean by that to say that there was only one jury-box for the district court for the eastern division of the southern district of Georgia, in the court-room.

Q. There is a box for the western division of the southern district of Georgia, is there not?

A. There is.

Q. And there was at that time?

A. There was.

Q. And that was not there?

A. It was not in the court-room.

Q. No names were drawn from that box by the judge on that day?

A. No names were drawn from the western division jury-box.

Q. The marshal has testified here, Mr. Barnes, that he personally took some of the names from the jury-box and handed them to the judge, or put them back on discovering that they were from Chathan or Glynn?

Mr. ERWIN: The marshal did not testify anything about putting them back.

Mr. ROSE: Or laid them down alongside of the box.

Mr. ERWIN: He said he handed them to the judge.

Q. Well, he took some names from the box. Do you mean to differ with him about that?

A. I don't remember about that, Mr. Rose. The marshal may have assisted the judge in taking some names from the box.

174 Q. You yourself testified on your cross-examination that the judge drew all the names from the box. You don't mean by that testimony to differ with the marshal?

A. I don't mean by that testimony to say that the marshal did not take up a few and assist the judge as he was drawing them from the box.

Q. Mr. Erwin, the session of the district court you have testified—a session of the district court was in session. For what division on the 22nd of November, when this jury was drawn?

A. It was in session for both divisions.

Q. For both divisions?

A. Yes sir.

Q. Do you hold court for both divisions in Macon?

A. The courts are open when the judge is not present in the division from Monday to Monday.

Q. That is for the purpose of clerk's fees?

A. No; by order of the court.

Q. Was Mr. King there first on the 22nd of November in court?

A. He was not.

Q. He is the clerk of the district court for the southern district, is he not?

A. He is.

Q. You are the deputy clerk of the district court assigned to the western division, are you not?

A. My residence is at Macon in the western division. I am deputy clerk for the entire district.

Q. For the southern district?

A. For the southern district.

175 Q. Do you perform any duties in the eastern division?

A. Occasionally.

Q. In the eastern division, I mean in Savannah?

A. Occasionally.

Q. Who is the deputy clerk that usually performs the duties in the eastern division?

A. S. F. B. Gillespie.

Q. Was he present in court at that time?

A. He was not.

Q. When the grand jury was drawn preceding the one drawn in November 1899, at Macon, when-ever that was, what was done with the names of jurors who were drawn after the drawing had taken place; with the slips containing their names?

A. Placed in an envelope and the date of drawing marked on the envelope and put back in the box.

Q. The envelope sealed up?

A. Sealed up ordinarily; not with wax.

Q. I don't mean that. I am not referring now to the November drawing?

A. I understand.

Q. The one prior to that time?

A. Some previous drawing that had taken place before.

Q. And that was the custom in the case of every drawing, was it?
A. Yes sir.

(By the COMMISSIONER:)

Q. Let me see if I understand it. Do I understand that a lot of tickets were drawn out of the wheel? Do you mean to say they were sealed up and an envelope, all the balance that are not
176 drawn are sealed up?

A. Those that are drawn and entered on the list are placed in an envelope and sealed up and put back in the box.

Q. What do you mean; put back in the jury-box with the tickets that are not drawn there?

A. There is a compartment in the jury-box; a division, and it is generally put in the back or front division.

Q. Now you have those tickets and they are entered on a list, of course, which list is attached to the venire and given to the marshal to serve?

A. Yes.

Q. Subsequently you enter those in a book, don't you; don't you keep a list of the jurors in a book, what is called a jury book, so as to call off in court, whether they are present or not?

A. I keep my list on the regular minute book of the court.

Q. Don't you keep the tickets out until after you make that call in court?

A. No sir; I have the list and from that list I enter on the list the names that were drawn.

(By Mr. ROSE:)

Q. The place where you put the envelope sealed containing the names—the slips—is that in the place where the loose slips are?

A. In a separate division.

Q. That is kept in a separate division for how long?

A. Until—well, for a year.

Q. And then the envelope is opened and the names are put into the other compartment and mixed up with the others?
177 A. Yes sir.

Q. Who does that?

A. Sometimes the marshal does it, and sometimes the judge.

Q. That is, he takes from this compartment containing this sealed envelope—I don't mean sealed in the sense of sealed with wax, but closed envelope—the envelope and opens it and puts the names that are in the envelope in the box from which the jurors are to be drawn?

A. Either the judge or the marshal, in the presence of the judge, takes the envelope—sometimes he does—takes the envelopes and opens them and mixes them up with the other names.

Q. Now at the time of the November drawing, how many envelopes were there in the other compartment?

A. I don't remember.

Q. Were there any?

A. I don't remember.

Q. You don't remember whether there was any?
A. No.
Q. And will you swear there were not?
A. No, sir, I will not.
Q. Is the city of Savannah in Chatham county?
A. It is.

Recross-examination by Mr. ERWIN:

Q. You are deputy clerk of the circuit court also for the southern district of Georgia?
A. I am.
178 Q. There is a jury-box known as the circuit court jury-box also for the eastern division, is there not?
A. There is.
Q. So that there are two jury-boxes for the eastern division, one for the circuit and the other for the district court?
A. Yes.

Mr. ERWIN: I want to tender in evidence this certified copy of the order, marked Exhibit 327 for identification.

Mr. ROSE: I thought you were going to wait until you got the full minutes.

Mr. ERWIN: I want it to go in *in* the record at the right place. I will state that I prefer to have the motion go with the order, and if I get it we can by agreement substitute it for the order alone.

Mr. KELLOGG: We object to the order because it is a certified copy and not the original.

The COMMISSIONER: I understood that after they had completed this document that you would not object to its going in as a certified copy.

Mr. KELLOGG: I don't object, but he is offering it now.

Mr. ROSE: I do not waive the point that it is not proper evidence because certified.

Mr. KELLOGG: Get the whole of it and there will be no trouble about it, but we want the whole of it.

179 The COMMISSIONER: I will reserve decision until you get it then.

Exhibit 327 for identification reads as follows:

Ex. 327. S. H. Oct. 17, 1900.

Department of Justice, office of United States attorney, southern district of Georgia.

MACON, GA., *Nov.* 22, 1899.

To the Honorable Emory Speer, judge of the district court of the United States for the southern district of Georgia.

SIR: In pursuance of the provisions of section 810 of the Revised Statutes, I have the honor to state that at the approaching session of the district court to be holden in the city of Savannah, on Decem

ber 4th next, a grand jury will be needed to pass upon certain cases the most important of which involve matters touching frauds alleged to have been committed in river and harbor improvements carried on by the Government in and about the cities of Savannah and Brunswick and which received much discussion and publicity among the people in the counties in which those cities are situate, making it more difficult and expensive to obtain an impartial trial of such matters from jurors drawn from those counties than if the jury be drawn from the other counties of the eastern division
180 of the district, and a jury drawn from the latter-mentioned counties would be most favorable to an impartial trial. On behalf of the United States I therefore respectfully request that the court will exercise the discretion reposed in it by section 802 Revised Statutes and have grand jurors for said session returned from the counties of the eastern division of the district other than the counties of Chatham and Glynn.

Respectfully, MARION ERWIN,
U. S. Attorney.

In the United States District Court for the Eastern Division of the Southern District of Georgia.

In re THE GRAND JURY.

Motion for and Order Thereon.

Upon consideration of the attached notice from the United States attorney, and the matters therein stated it is ordered by the court that a grand jury be drawn from the jury-boxes of the eastern division of the district and summoned to attend the session of the court to be holden in the city of Savannah on December 4th 1899, and that said jury be returned from the counties of said eastern division other than the counties of Chatham and Glynn, it appearing to the court that such return of jurors will be most favorable to an impartial trial and prevent the *re*curring of unnecessary expense.

In open court, Macon, Ga., Nov. 22, 1899.

181 Endorsement: U. S. district court for eastern division, southern district of Ga. *In re* grand jury. Motion for grand jury to be drawn, and order thereon under sec. 810 R. S. Filed November 22nd 1899. L. M. Erwin, deputy clerk.

I hereby certify that the above is a true and correct copy of the original motion and order now of file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Savannah, Georgia, this 20th day of October A. D. 1900.

[Seal U. S. District Court, Southern District of Georgia.]

H. H. KING, *Clerk.*

182 SAMUEL F. B. GILLESPIE, a witness called on behalf of the defence, being duly sworn, testified as follows:

Examined by Mr. ROSE:

Q. Where do you reside?
A. Savannah, Georgia.
Q. What is your business or occupation?
A. I am deputy clerk of the United States courts, circuit and district courts.
Q. In Savannah?
A. In Savannah.

Examination adjourned to Thursday, November 8th 1900, at 10.45 a. m.

SAMUEL F. B. GILLESPIE, examination resumed.

By Mr. ROSE:

Q. How long have you been deputy clerk of the district court for the southern district of Georgia?
A. Since the 30th of June 1886; 14 years and a little over.
Q. Where is your office located?
A. In the new public building, corner of Bull and President streets, Savannah, Georgia.
Q. How long has it been in that building?
A. Since the 1st of October, a year ago.
Q. Prior to that time was the clerk's office for that division—the eastern division—in the city of Savannah?
A. In the custom-house building.

183 Q. And it was there all the time you were deputy clerk from 1886 until you moved to the new building in October 1899?
A. Yes sir.
Q. During the time you have been clerk have you or have you not been in personal charge and control of the records there?
A. Yes sir.
Q. Filing of papers sent there?
A. Yes sir.
Q. And entering them in the minutes of the court?
A. Yes sir.
Q. How many divisions are there in the southern district of Georgia?
A. Three.
Q. Name them?
A. Eastern, western and northeastern.
Q. Savannah is in what division?
A. Eastern.
Q. How many counties are there in the eastern division of the southern district of Georgia?
A. 28.

Q. And was there the same number of counties during all the time that you have been deputy clerk?

A. No sir, the northeastern division was taken off from there.

Q. When?

A. I cannot say; I think it was in 1888 or 1889.

Q. Since January 1st 1897, how many counties have there been in the eastern division of the southern district of Georgia?

A. Twenty-eight.

Q. I call your attention to Exhibit "I 5," for identification which is a certified copy of an order for the revision of the jury-list, dated 27th day of January 1897. Do you recall ever seeing that paper before?

A. Yes sir; I made it myself.

184 Q. And you copied it from the original?

A. Yes.

Q. Where was the original?

A. In the clerk's office.

Q. At Savannah?

A. Yes.

Q. On file?

A. On file, yes.

Q. Is the original also entered in the minutes of the court?

A. Yes sir.

Q. How many counties are there named in that order?

A. Fourteen.

Q. Those counties are all counties of the eastern division?

A. Yes sir.

Q. The other fourteen counties of division are not named in that order?

A. No sir.

Q. That order among other things appoints a jury commissioner. What was his name?

A. Edward S. Elliott.

Q. Do you know whether or not of your own knowledge that shortly after that time, or some time after that, that Mr. Elliott qualified as a jury commissioner?

A. Yes sir.

Q He did?

A. Yes.

Q. Do you know how long he continued to hold that office as a jury commissioner?

A. Until May 23rd, 1899.

Q. Was there any action taken by the court with reference to his ceasing to be an officer?

A. Yes sir.

Q. Was that action entered upon the minutes of the court?

A. Yes sir.

Q. Have you a copy of those minutes here, certified?

A. Yes sir.

185 Q. Be kind enough to hand it to me?

A. This is the copy of his resignation and the acceptance by the judge, district court minutes 48.

Q. This is correctly made by you from the minutes of the court?
A. Yes, sir.

Mr. ROSE: I offer it in evidence, stating on the record so that we can have it, that it is the resignation of Mr. Elliott as jury commissioner, accepted on the 23rd of May, 1899.

Ex. K 5. S. H. Nov. 8, 1900.

In the District Court of the United States for the Southern District of Georgia, Eastern Division.

Resignation of Jury Commissioner.

To the Honorable Emory Speer, judge presiding:

The petition of Edward S. Elliott respectfully shows that he desires to resign as jury commissioner for the district court of the United States for the southern district of Georgia, eastern division.

EDWARD S. ELLIOTT.

The resignation of Edward S. Elliott, as jury commissioner as above stated, is accepted.

May 23, 1899.

EMORY SPEER, *Judge.*

D. C., 48. Filed May 23, 1899.

S. F. B. GILLESPIE,
Deputy Clerk.

I hereby certify that the above is a true and correct copy of the resignation and acceptance of the same, of Edward S. Elliott, as jury commissioner for the eastern division of the southern
186 district of Georgia, as the same remains of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Savannah, Georgia, this 26th day of October 1900.

[Seal U. S. District Court, Southern District of Georgia.]

H. K. KING, *Clerk.*

The WITNESS: Mr. Rose, one minute, please, about that paper. The resignation of the jury commissioner is not on the minutes. The order of the judge is on the minutes.

Q. The resignation is, however, on the files, and copied by you there?

A. Yes sir; and the acceptance by the judge, D. C., 48 is on the minutes.

Q. D. C. 48, means what?

A. District court, 48.

Q. Of the book of minutes?

A. Yes sir.

Q. From the 23rd of May 1899, down to the present time, has

there been any jury commissioner for the southern district of Georgia in the eastern division?

A. No sir.

Q. One has never been appointed?

A. I have no record of it in the Savannah minutes.

Q. You have all the minutes there of that division?

A. Yes sir.

The COMMISSIONER: There had been no jury commissioner since when?

187 Mr. ROSE: May 23rd, 1899.

The WITNESS: For that division.

Mr. ROSE: For that division.

Q. Some time after January 26th, 1897, the date of the appointment of Mr. Elliott as a jury commissioner, do you know whether anything was done with reference to revising the jury-list by the jury commissioner?

A. Yes sir.

Q. When was that done?

A. It was in the latter part of March.

(By the COMMISSIONER:)

Q. What year?

A. 1897.

(By Mr. ROSE:)

Q. 1897?

A. Yes.

Q. Now tell us what was done with reference to putting names in that box; in the jury-box?

A. Mr. King, the clerk, and Mr. Elliott, the jury commissioner, addressed letters to each of the county clerks of the 28 counties——

Mr. ERWIN: Now wait a minute. I object to the line of evidence that defendants are now entering upon, upon the following grounds: First, that it is an attempt to go behind the records of the district court of the United States for the eastern division of the southern district of Georgia, which is a court of record; its acts and proceedings are to be proved by matters of record and not by oral testimony. That if there be any irregularities—which I do not admit—but if there be any irregularities of any sort, that it cannot be raised in a collateral proceeding. The

188 matter of the assembling of the grand jury, the empaneling of the grand jury, the returning of the indictment into court, and all that, are matters entered upon the minutes of the court and import verity, and if attached at all it would have to be in the court where these proceedings were had and at a proper time and place. The defendants, as appears of record, were indicted on December 8th 1899, and numerous terms of the court have intervened since that time, and since the defendants were apprised by actual arrest in this court—the southern district of New York—of the proceed-

ings had against them down there, and if any such irregularities exist they have long since been waived and at any rate cannot be brought out by oral testimony in a collateral proceeding here and would have to be in a plea to the indictment, or demurrer in the court where the indictment is pending. And, second, I object to the testimony about the manner in which the jury commissioner and the clerk made up their list, entering into correspondence. We do not know what those letters were and we are going now into oral testimony as to contents of letters addressed by the jury commissioner and his clerk.

The COMMISSIONER: Of course you can't go into that unless this clerk did it himself.

Mr. ROSE: This is simply preliminary.

189 Mr. ERWIN: The whole proceeding is an attempt to go behind the record, and therefore I enter my formal objection to this whole line of testimony.

Mr. ROSE: May I put on the record the reason for asking this question. Among the papers offered in evidence is an alleged indictment. That is a piece of evidence before your honor, which your honor is to consider in the examination of this question of probable cause. Another thing, they are asked to be removed for trial on that indictment. I propose to show before I get through with it that that indictment is false in that it states a grand jury properly drawn for the eastern division &c. In other words, that that piece of evidence can be given no force, weight or effect by your honor in this determination, because it has no legal existence. The same way as if a deed had been tendered in evidence it would be entirely proper for me to show that the signature was a forgery, although it may have been properly acknowledged. That is the line I am on.

The COMMISSIONER: I overrule the objection and take the answer.

Q. Do not give us the contents of the letter, but simply state certain letters were sent to county clerks, if you know of your own knowledge?

A. Yes, certain letters were sent.

190 Q. Now was there a list of names made up, now with reference to the revision of the jury?

A. Yes sir.

Q. Was that put in a piece of paper, in a book or what?

A. They were letters we received from clerks.

Q. Was there a list of names made up in a book called a jury book?

A. That was after the tickets were made.

Q. Were there tickets made up?

A. Yes sir.

Q. Containing what?

A. Containing the names we selected.

Q. And anything with reference to the counties?

A. Yes sir, and post-office and address.

Q. And counties?

A. Yes sir.

Q. The counties included were only of the 14 mentioned in this order of January 27th 1897, Exhibit "I 5"?
A. No sir; there were 28 counties.
Q. Of the whole 28 counties?
A. Yes sir.

The COMMISSIONER: You are speaking of when this was originally made up?
Mr. ROSE: No; I am speaking of the time after Elliott's appointment.
The WITNESS: That was what I meant.

Q. For the whole 28 counties?
A. For the whole 28 counties and they are in this book.
Q. Look again; I know you are wrong, and I don't want to have you in error about it.
A. No; I am wrong about it. It is in these 14 counties.
Q. Of the 14 counties mentioned in this order?
A. Yes sir.
191 Q. No names from any other part of the division was put on the tickets except from the 14 counties included in this order of January 26th 1897, which is Exhibit "I 5" for identification. Is that right?
A. That is right.
Q. From these tickets was a book made?
A. Yes sir.
Q. By whom?
A. By myself and the clerk.
Q. And compared by you?
A. Yes sir.
Q. And it was made accurately?
A. Yes sir.
Q. Where is that book; the original book?
A. It is in Savannah.
Q. In the clerk's office?
A. Yes sir.
Q. Have you made a copy of that book?
A. Yes sir.
Q. Have you it here?
A. Yes sir.
Q. Let me see it?
A. (Book produced by witness.) It is certified by the clerk.
Q. This book endorsed on the outside "United States district court jury-list, eastern division, southern district of Georgia, revised for May term 1897," has attached to it the certificate of the clerk that it is a copy of the original. In addition to that have you personally compared this book with the original?
A. Yes sir.

Mr. ROSE: Now I offer it in evidence.
Mr. ERWIN: The same objection we have already made in regard to the line of testimony going in, as already stated. I do not object

to the certified copy on the ground that the original ought
192 to be brought instead of the certified copy, but the objection is made the same as if he had the original here. If he had the original here I would object on the ground that the original is brought away from the court.

Objection overruled. Exception taken.

Marked Exhibit "L 5," S. H., November 8th 1900.

193 Ex. L 5. S. H. Nov. 8, 1900.

United States District Court Jury List, Eastern Division, Southern District of Georgia, Revised for May Term, 1897.

A.

Names.	Post-office.	County.
Adler, Leopold	Savannah	Chatham
Appleton, Geo. L	"	"
Allen, David C	"	"
Anderson, R. S	"	"
Armand, Ernest A	"	"
Askew, Walter C	"	"
Archer, G. M	Waycross	Ware
Ashley, C. R	Valdosta	Lowndes
Austin, W. M	Jesup	Wayne
Albritton, C. W	Waynesville	"
Alday, Mathew	Fairchild	Decatur
Alday, G. B	Donaldsville	"
Avera, James W	Quitman	Brooks
Averett, George W	"	"
Austin, George W	"	"
Adams, Wm. H	Savannah	Chatham
Andrews, F. A	"	"
Armstrong, W. D	"	"
Armstrong, J. W	"	"
Anderson, C. G	"	"
Alexander, Robert	Thomasville	Thomas
Averett, D. P	Statesboro	Bulloch

194 B.

Barney, W. M	Jesup	Wayne
Brown, W. R	Brinson	Decatur
Bowen, Robert	Cyrene	"
Brinson, J. H	Brinson	"
Barrineau, S. J	Faceville	"
Bethea, A. B	Fowlston	"
Bell, Jas	Whigham	"
Benton, A. R	Donaldsville	"
Brunsin, Reuben	"	"
Braswell, Kin	Fairchild	"

	Names.	Post-office.	County.
	Bower, Robert E.	Quitman	Brooks
	Busley, Thos. J.	"	"
	Beasley, David A.	"	"
	Beaty, Berrian.	"	"
	Benghill, John.	Isom	"
	Bruce, David A.	"	"
	Bozeman, John D.	Quitman	"
	Brannen, J. G.	Statesboro	Bulloch
	Bunce, J. A.	"	"
	Brewer, Williamson T.	Tuscolas	Effingham
	Brewer, Robert H.	"	"
	Bell, W. R.	Brinson	Decatur
c.	Block, Francis, c.	Savannah	
c.	Bugg, I. H.	"	
c.	Bowens, G. L., c.	"	
c.	Bright, Thomas A., c.	"	
c.	Balin, John, c.	"	
	Branch, H. M.	"	
195	Byck, Max L.	Savannah	
	Besselieu, Thos. E.	"	
	Bourne, W. H.	Porter	Chatham
	Bonfin, Henry G.	"	"
	Bacon, Hol. H.	Savannah	Chatham
	Baker, Marcus S.	"	"
	Barrett, Michael J.	"	"
	Bartlett, Henry.	"	"
	Beck, James L.	"	"
	Berry, James F.	"	"
	Berry, William H.	"	"
	Bevill, Frank B.	"	"
	Black, Edward G.	"	"
	Blois, William F.	"	"
	Byck, Chas. S.	"	"
	Bohan, Wm. M.	"	"
	Bourguin, Guilleman.	"	"
	Breeman, Patrick.	"	"
	Brooks, Jordan F.	"	"
	Bruell, Henry H.	"	"
	Burgess, John E.	"	"
	Bussey, Wm. W.	"	"
	Bent, Wm. M.	"	"
	Bragdon, Rob't K.	"	"
	Black, Henry G.	"	"
	Bradley, W. H.	Waycross	Ware
	Brown, T. L.	"	"
	Bibb, F. W.	"	"
	Brewer, W. H.	Hinesville	Liberty
196	Briggs, James M.	Valdosta	Lowndes
	Briggs, Mat. A.	"	"
	Briggs, H. C.	"	"

Names.	Post-office.	County.
Bentley, R. W.	Valdosta	Lowndes
Black, J. F.	Jesup	Wayne
Bennett, Henry	"	"
Bennett, J. Hamp.	"	"
Bell, Joseph J.	"	"
197	C.	
Carolan, John J.	Savannah	Chatham
Charlton, Ed. T.	"	"
Carswell, John D.	"	"
Cooper, William G.	"	"
Cults, C. A.	"	"
Cannon, Rob't P.	"	"
Carter, Barron	"	"
Cassels, A. Gordon	"	"
Courtney, Richard M.	"	"
Crane, Wm. H.	"	"
Crisfield, J. S. P.	"	"
Cubbedge, Edwin W.	"	"
Cubbedge, Richard W.	"	"
Cummings, John J.	"	"
Cunningham, C. A. L.	"	"
Cunningham, Collolcohn	"	"
Cooley, Martin	"	"
Covington, H. L.	Waycross	Ware
Cason, Jno. P.	"	"
Cason, R. D.	"	"
Childress, P. M.	Valdosta	Lowndes
Callahan, A. J.	Bainbridge	Decatur
Chapman, W. T.	Whigham	"
Carr, R. D.	Donaldsville	"
Crawford, R. H.	Steam Mill	"
Crane, George B.	Quitman	Brooks
Crenshaw, Wm. J.	Tallakas	"
Cassels, R. Frank	McIntosh	Liberty
Chapman, James L.	Johnson Station	"
Chapman, Francis J.	" "	"
Cornelius, J. B.	Hornerville	Clinch
Crumbly, J. S.	Portal	Bulloch
Crawford, James E.	Eden	Effingham
Coleman, J. L.	Statesboro	Bulloch
Cohm, F. M., c.	Savannah	
Clark, Paul, c.	"	
Carter, J. H., c.	"	
Coshin, Benj., c.	"	
198	D.	
Daffin, Wm. S.	Savannah	Chatham
Delaney, Joseph E.	"	"
Demmond, Edward K.	"	"

Names.	Post-office.	County.
Denhardt, William	Savannah	Chatham
Dent, James T	"	"
Dixan, Merritt W	"	"
Dixon, William D	"	"
Deal, Zachariah	Fleming	Liberty
Dasher, J. A., Jr	Valdosta	Lowndes
Dunn, H. T	Brunswick	Glynn
Dunn, F. A	"	"
Douglas, R. V	"	"
Downing, C	"	"
De Lorch, Jack	Quitman	Brooks
Dugger, James H	Ellabelle	Bogar
Delk, Wm. S	Johnson Station	Liberty
Dickerson, Josiah S	Clinch	Clinch
Dame, John T	Hornerville	"
Dame, George M	"	"
Darley, G. S	"	"
Dekle, A. H	Pelham	Decatur
Dasher, Homer R	Guyton	Effingham
Donaldson, R. F., Jr	Statesboro	Bulloch
De Loach, W. H., Jr	"	"
Donaldson, W. P	Blitch	"
Deveraux, John H., c	Savannah	
Dessevnesy, Edw'd E., c	"	
Dunham, F. D., c	"	

E.

Elliott, Ralph	Savannah	Chatham
Ehrlich, Ambrose	"	"
Edmondson, Chas	"	"
Eichberg, Alfred S	"	"
Elliott, Arthur B	"	"
Einsfield, Frederick	"	"
Ellis, Charles, Jr	"	"
Ely, Charles C	"	"
Emery, Joseph F	"	"
Englerth, Joseph T	"	"
Evans, John T	"	"
Emanuel, N	Brunswick	Glynn
Elliott, E. O	"	"
Elkins, Samuel C	Pimora	Effingham
Exley, Chas. N	Exley	"
Erwin, M. A., c	Savannah	
Erwin, W. H., c	"	

199 F.

Flint, Alexander F	Savannah	Chatham
Floyd, James B	"	"
Foley, Michael F	"	"
Falliard, Thomas A	"	"

Names.	Post-office.	County.
Footman, Geo. D.	Savannah	Chatham
Fox, John H.	"	"
Fraser, Donald J.	"	"
Freeman, John F.	"	"
Fripp, William C.	"	"
Fulton, Charles F.	"	"
Furber, James H.	"	"
Fleming, John S.	Walthourville	Liberty
Fleming, P. W.	Brunswick	Glynn
Fuller, Thomas,	"	"
Funderburk, C. L.	Brinson	Decatur
Frieman, S. W.	Donaldsonville	"
Fiveash, S. C.	"	"
Finn, J. L.	Thomasville	Thomas
Futch, M. M.	"	"
Fudge, B. D.	"	"
Fiveash, D. D.	Dupont	Clinch
Fiveash, Wm. J.	"	"
Fay, E. Jackson	Greyton	Effingham
Frevermuth, Chas. E.	Springfield	"
Falcher, J. A.	Statesboro	Bulloch
Fetzer, Robert C.	White Bluff	
Fernber, T. E., c.	Savannah	

G.

Gadsden, Geo. M.	Savannah	Chatham
Gray, Christopher P.	"	"
Goebel, Geo. C.	"	"
Guerard, Augustus G.	"	"
Glover, Augustus M.	"	"
Goebel, P. B.	"	"
Golden, John W.	"	"
Goodwin, Sidney P.	"	"
Gordon, George A.	"	"
Grady, W. Edwin	"	"
Graham, James J.	"	"
Graham, Joseph L.	"	"
Grayson, William L.	"	"
Girmon, Diedrich	"	"
Grass, James A.	"	"
Grover, Solomon.	Scriven	Wayne
Guinn, L. E.	Brunswick	Glynn
Griffen, Pleasant D.	Hoboken	Pierce
Gag, John W.	Lanier	Bryan
Gag, Daniel J.	"	"
Gill, John B.	Rodney	"
Gill, William W.	"	"
Graffins, W. J.	Pearson	Clinch
Gibson, J. T.	Dupont	"

Names.	Post-office.	County.
Geter, W. S.	Savannah	
Giles, Philip Y., c.	"	
Gardner, Jacob	Savannah	
200 H.		
Hopkins, W. Trenholm	Savannah	Chatham
Howard, C. Wallace	"	"
Hudson, J. A.	"	"
Hager, John W.	"	"
Hager, T. Pinckney	"	"
Hull, Henry H.	"	"
Hull, Robert M.	"	"
Hunter, Wright	"	"
Hulton, John A.	"	"
Halligan, Thomas	"	"
Harris, George S.	"	"
Harman, Abram W.	"	"
Haskell, Lewis W.	"	"
Hagan, John M.	"	"
Harmon, Adam C.	"	"
Hexter, Swain	"	"
Hobersham, Ed. M.	"	"
Haile, John C.	"	"
Harder, James G.	"	"
Hopp, R. B.	Jesup	Wayne
Hendry, George N.	"	"
Herron, Aaron	Lalaton	"
Herron, W. H.	Lalaton	"
Hatcher, J. C., Snr.	Mt. Pleasant	"
Huntington, H.	"	"
Hodges, Laurence	Egypt	Effingham
Hodges, Washington P.	Walthourville	Liberty
Harden, John L.	Brunswick	Glynn
Hopkins, R. R.	Brunswick	Glynn
Henderson, James	Blackshear	Pierce
Hughes, T. D.	"	"
Hambleton, W. B.	Thomasville	Thomas
Hicks, R. L.	"	"
Hayes, S. L.	"	"
Heeth, P. S.	"	"
Haskill, Paul T.	Ways Station	Bryan
Harris, Israel S.	Clyde	"
Hagins, W. A.	Mill Ray	Bulloch
Holland, E. D.	Statesboro	"
Hawks, C. S.	Quitman	Brooks
Hughes, James H.	Dupont	Clinch
Haxford, W. H.	Homerville	"
Hughes, Jeptha	Dupont	"
Heidt, Daniel G.	Savannah	
Hughes, C. H.	Dupont	Clinch

Names.	Post-office.	County.
Habersham, J. C., c	Savannah	
Habersham, John W., c	"	
Hernandez, Robert H., c	"	
Hendry, Norman C	Valdosta	Lowndes
201	I.	
Inglesby, Charles	Savannah	Chatham
Irvin, Thomas B	"	"
Isey, H. W	Thomasville	Thomas
	J.	
Jones, B. F	Lalaton	Wayne
Johns, Jeremiah J	"	"
Jackson, W. A	Jesup	"
Joyner, Joseph E	"	"
Jones, George P	Guyton	Effingham
Johnson, J. B	Fairchild	Decatur
Jones, S. A	Thomasville	Thomas
Jerger, L. H	"	"
Jones, M. B	"	"
Johnson, J. M	Blackshear	Pierce
Johnson, Sol. C., c	Savannah	
Jones, F. T., c	"	
Jackson, Albert, c	"	
Jones, J. F., c	"	
Jordan, C. G., c	"	
	K.	
Kick, Thomas P	Savannah	Chatham
Kehoe, William	"	"
Kelley, Augustus H	"	"
Kelly, Laurence	"	"
Ketchum, Wm. A	"	"
Kiernan, Patrick A	"	"
King, Alfred F	"	"
King, Mitchell	"	"
Kirby, John J	"	"
Kollock, M. C	"	"
Kolsborn, Fred	"	"
Kops, J. de Bruyn	"	"
Kops, W. de Bruyn	"	"
Kayton, Lewis	"	"
Kedundy, E. J	"	"
King, J. C	"	"
Kicklighter, A. C	Scriver	Wayne
Knox, James, Jr	Waycross	Ware
Knight, J. R	"	"
Killer, D. L	Brunswick	Glynn
King, H. M	"	"
Kaiser, M	"	"

Names.	Post-office.	County.
Knox, John F	Blackshear	Pierce
Keller, John A	Clyde	Bryan
Kelley, D. W	Cairo	Decatur
Kennedy, M. J	Excelsior	Bulloch
202 L.		
Lebey, D. V	Savannah	Chatham
Lefler, Adolph M	"	"
Le Hardy, Louis M	"	"
Lehwald, Henry	"	"
Leopold, Wm. T	"	"
Levy, Henry	"	"
Lewis, James F	"	"
Livingston, H. H	"	"
Lockwood, B. P	"	"
Logan, Hugh	"	"
Lucas, Arthur M	"	"
Lynch, Paul H	"	"
Littlefield, O. F	Jesup	Wayne
Leigh, J. W	Waycross	Ware
Latt, Joel	"	"
Lee, W. P	"	"
Lane, D. W	Brinson	Decatur
Lewis, Geo. B., c	Savannah	
Lears, C. A., c	"	
Ladereze, C. A., c	"	
Logan, W. G., c	"	
M and Mc.		
McAlpin, J. W., Jr	Savannah	Chatham
McCarthey, L. A	"	"
McCullom, W. E	"	"
McFadden, H. C	"	"
McFarland, Jos. W	"	"
McIntyre, Jas. W	"	"
McCauley, W. F	"	"
McDonough, Jno. J	"	"
McGrath, James	"	"
Marshall, F. H	"	"
Moore, A. B	"	"
Morgan, H. C	"	"
Morse, Frank H	"	"
Myers, Herman	"	"
Mohr, Anson	"	"
Morrison, James L	"	"
Miller, W. Freeman	"	"
Miltin, C. D	"	"
Miscally, W. J., Jr	"	"
Morel, Calhoun T	"	"
Morrissy, Michael A	"	"

	Names.	Post-office.	County.
	Motte, John W	Savannah	Chatham
	Moyn, Albert	"	"
	Mumford, Sam'l L	"	"
	Murphy, James L	"	"
	Murray, Frank J	"	"
	Mustin, Chas. E	"	"
203	McEachern, John P	Marlow	Effingham
	McNeill, Lawrence	"	"
	Mattox, Jackson L	Mildrom	"
	Morgan, Sam'l H	Greyton	"
	Mallory, Robert P	Clyo	"
	McKey, Thos. S	Valdosta	Lowndes
	Miller, S. F	Way Station	Ware
	McCally, W. W	"	"
	Mallon, J. W	"	"
	Mallon, W. R	"	"
	Morton, T. H	"	"
	Marshall, S. A	"	"
	Morgan, A. H	"	"
	McGee, D. A	"	"
	Metsgar, Oscar E	Clyo	Effingham
	Mingledorf, Elliott F	Springfield	"
	McRee, William	Valdosta	Lowndes
	Maxwell, Carlin C	Waycross	Bryan
	Moore, Thos. B	Belknap	"
	Morgan, John D	Savannah	"
	Morrison, John	Ellabelle	"
	Miller, Wm	Thomasville	Thomas
	McIntyre, W. R	"	"
	McDowell, A. G., c	Savannah	
	Magner, Richard, c	"	
	Morse, Sam'l B., c	"	
	McFall, S. S., c	"	
	Middleton, James, c	"	
	Milledge, G. M., c	"	
	Morgan, Benj. F	Kingsville	Chatham
	Mager, David W	Montgomery	"
	Meyres, Austin R	Savannah	"

N.

	Nooman, Jno. C	Waltonville	Liberty
	Nesmith, M. N	Pelham	Decatur
	Nichols, Fenwick T	Savannah	

O.

	O'Byrne, R. C	Savannah	Chatham
	O'Connor, E. H	"	"
	O'Donnell, Thos. F	"	"
	O'Neill, John J	"	"
	Oakman, R. R	"	"

Names.	Post-office.	County.
Oelschig, S. C.	Savannah	Chatham
Offult, William C.	"	"
Ott, W. P.	"	"

204 P.

Palmer, Armin B.	Savannah	Chatham
Popy, Frank B.	"	"
Pritchard, Geo. B.	"	"
Parrish, Geo. W.	"	"
Paulsen, Nicholas (dead)	"	"
Penton, George O.	"	"
Perry, Eldridge M.	"	"
Polk, Robert H.	"	"
Pendleton, A. S.	Valdosta	Lowndes
Parrish, A. A.	"	"
Paine, C. H.	"	"
Passmore, J. A. B.	Mineola	"
Pearson, A. S.	Avant	Pierce
Parratt, J. C.	Brinson	Decatur
Powell, W. G.	Cyrene	"
Parker, Jas. E.	Johnson Station	Liberty
Park, Linton S., c	Savannah	

R.

Rockwell, R. L.	Savannah	Chatham
Rankin, James L.	"	"
Rebarer, Frank	"	"
Richardson, W. L.	"	"
Richmond, C. A.	"	"
Riley, John	"	"
Rivers, Horace	"	"
Robertson, Jno. G.	"	"
Robinson, W. A.	"	"
Rose, William H.	"	"
Ross, Sam	"	"
Rowland, John F.	"	"
Rowland, John T.	"	"
Reiser, Daniel E.	Clyo	Effingham
Roberts, Zeafh B	Blackshear	Pierce
Reynolds, James M.	"	"
Roach, Geo. S.	Johnson Station	Liberty
Ramsey, C. H.	Quitman	Brooks
Roberts, L. E.	Okapilco	"
Roberts, Hezekiah	"	"
Ryall, Chas. W.	Isom	"
Ragall, W. H., c	Savannah	
Roberts, E. B., c	"	
Rennair, Alex., c	"	

205 S.

Names.	Post-office.	County.
Shotter, Spencer P.	Savannah	Chatham
Shuptim, James T.	"	"
Silverberg, Isadore	"	"
Snedeker, C. N.	"	"
Southcolt, B. D.	"	"
Springer, Peter B.	"	"
Stillwell, C. B.	"	"
Storer, Frank W.	"	"
Strohbar, W. G.	"	"
Stuts, Chas. E.	"	"
Sutcliffe, Henry J.	"	"
Swanston, John J.	"	"
Swanston, Walter E	"	"
Snell, M. P.	Jesup	Wayne
Smith, S. B.	"	"
Smith, John G.	"	"
Stripling, A. W.	"	"
Smith, E. M.	Thomsonville	Thomas
Shearouse, Barton K.	Springfield	Effingham
Shearouse, John N.	Guyton	"
Shave, Thos. J.	Fleming	Liberty
Saunders, J. R.	Valdosta	Lowndes
Staten, James L.	"	"
Strickland, B. F.	"	"
Sarat, Thos. N.	Blackshear	Pierce
Smith, Lyman	Homerville	Clinch
Simons, B. J.	Dupont	"
Sernams, L. A.	"	"
Solomons, H. J.	Homerville	"
Saunders, J. T.	Fairchild	Decatur
Stewart, Wm. F.	Johnson Station	Liberty
Smith, Milton M.	"	"
Shim, Robert J.	Quitman	Brooks
Stanley, Jno. G.	"	"
Stansel, Geo. W.	"	"
Sernams, J. W.	Dupont	Clinch
Strickland, Louis.	Valdosta	Lowndes
Snud, John, c.	Savannah	
Styles, W. H., c.	"	
Scarboro, Joseph, c.	"	
Smalls, L. A., c.	"	
Sykes, W. H., c.	"	
Shiftall, J. B., c.	"	
Stephens, E. A., c.	"	
Savage, John D., c.	"	
Smith, J. Arthur, c.	"	
Stokes, A. L.	"	
Stewart, S. C.	"	
Strack, Herman W.	Thunderbolt	Chatham

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Names.	Post-office.	County.
Tatem, Robert H.	Savannah	Chatham
Tiedeman, Geo. W.	"	"
Theus, Simeon E.	"	"
Tyre, George	Jesup	Wayne
Tyre, John A.	"	"
Thompson, R. A.	"	"
Triplitt, John	Thomasville	Thomas
Thomas, R.	"	"
Thomas, Banner M.	Hoboken	Pierce
Taylor, George W.	Blackshear	Pierce
Touchton, Jesse C.	Stockton	Clinch
Tomlinson, Staten B.	"	"
Tomlinson, Harris A.	"	"
Tomlinson, Joseph B.	Dupont	"
Touchton, Henry	"	"
Tomlinson, Joseph R.	"	"
Tomlinson, Duncan V.	"	"
Thomas, F. A.	Iron City	Decatur
Talbert, J. D.	Brinson	
Troatman, Claude H.	Quitman	Brooks
Tarna, Henry	"	"
Thomas, E. L.	Valdosta	Lowndes
Taberty, Patrick	Savannah	
Thomson, F. Henry	Isle of Hope	Chatham
Thigpen, W. R.	" "	"
Thomas, R. H.	Savannah	

U.

Underwood, Joseph B.	Quitman	Brooks

V.

Varn, J. B.	Valdosta	Lowndes

W.

	Williams, G. W.	Jesup	Wayne
	Wilkins, J. R.	"	"
	Wilkins, W. T.	"	"
	Wilkins, T. S.	"	"
	Whaley, H. W.	"	"
	Whaley, W. H.	"	"
	Watt, James	Thomasville	Thomas
	Wight, J. B.	Cairo	"
	Williams, B. H.	Waycross	Ware
	Wilson, H. W.	"	"
	Wilson, W. M.	"	"
207	Wisenbaker, J. Z.	Valdosta	Lowndes
	Warren, S. J.	Brinson	Decatur

Names.	Post-office.	County.
Wood, A. V	Brunswick	Glynn
Ward, John A	"	"
Wrench, T. A	"	"
Wright, J. S	"	"
Winn, Abul F	Dorchester	Liberty
Williams, K. H	Quitman	Brooks
Wade, Milton C	"	"
Williams, Edward A., c	Savannah	
Wilson, S. A., c	"	
White, Robert, c	"	

Y.

Young, H. M	Mincola	Lowndes
Youmans, George R	Waycross	Ware
Youmans, John	"	"
Young, F. M	"	"
Youmans, S. L	Blackshear	Pierce
Young, John R	Savannah	

UNITED STATES OF AMERICA,
Eastern Division, Southern District of Georgia, } ss:

I, H. H. King, clerk of the district court of the United States of America, for the southern district of Georgia, do hereby certify that the writing annexed to this certificate is a true copy of its respective original now on file, and remaining on record in my office, to wit: United States district court jury book, eastern division, southern district of Georgia, revised for May term, 1897, under order of court, dated January 26, 1897.

In witness whereof, I have caused the seal of the said circuit court to be hereunto affixed, at the city of Savannah, in the southern district of Georgia, this 27th day of October, in the year of our Lord, one thousand nine hundred (1900) and of the Independence of the United States, the one hundred and twenty-fifth.

[SEAL.] H. H. KING, *Clerk.*

208 Q. I think you have already stated—if I am wrong correct me—that all the names on the tickets were entered in this book?

A. Yes sir.

Q. How many names were there?

A. 562.

Q. What was done with those tickets?

A. I made them out myself and put them in the box; Mr. Elliott and myself.

Q. Mr. Elliott and yourself put them in the what box?

A. In the district court jury-box.

Q. In the district court jury-box; when was that?

A. I have not got the date. It was about the 1st of April.

Q. What year?

A. 1897.

Q. At the time that was done who was present?

A. Mr. King the clerk.

Q. And who else?

A. Mr. Elliott and myself.

Q. And yourself. In putting them in how did you put them in; tell us what was done with reference to that?

A. Well, I made them out on typewritten paper in two columns; I cut them this way and cut them that way and folded them. (Indicating.)

209 Q. That made the tickets?

A. That made the tickets. Mr. Elliott and I put them in alternately; he would put in some and I would put in some others.

Q. You mean he would put in a bundle?

A. He would put in a bunch as I folded them, and I would put in a bunch as I folded them. They were made out on typewritten paper with space between down this side of the sheet and down the other side, and cut in two, then cut crosswise and then folded once.

Q. When folded the names could not be seen?

A. No sir.

Q. Mr. King was present during all this time while you were doing this?

A. While we were putting them in the box.

Q. Did he put any in the box himself?

A. No sir; Mr. Elliott and I did it myself. Mr. King supervised it.

Q. Mr. King was not sick or disabled?

A. Oh, no. He was simply sitting there present. He turned the work over to me of course.

Q. But he was present in the room all the time?

A. He was in the room.

Q. And you cut up a few sheets of these and folded them?

A. Yes sir.

Q. And Mr. Elliott would cut up a few sheets of them and fold the tickets?

A. Yes.

Q. And then you would put in the bunch you had folded and he would put in the bunch he folded?

210 A. About half the tickets I made myself on the typewriter. The other half were made by Mr. Elliott's clerk, and I am not positive but I am very sure that Mr. Elliott cut up his own tickets; but I know that I cut up mine.

Q. You put in the tickets that you had made?

A. Yes sir.

Q. And he put in the tickets that he had made?

A. No, not necessarily. They were all there on the desk and folded and they were copied in the original of that book before they were cut apart from these sheets.

Q. Now did you put in one ticket alone, a single ticket, and then Mr. Elliott following you put in another one?

A. No sir.

Q. And then you put in a third?

A. No.

Q. And he put in the fourth, and so on until they were all put in?

A. No sir; they were bundled up until we got a pile of them and then we put them in the box together.

Q. Now from that time until the 1st of January 1900, was there any other revision of the jury-box for the eastern division of the southern district of Georgia?

A. No sir.

Q. That was the last and only one that was ever made by Mr. Elliott?

A. Yes sir.

Q. First and last and only one?

A. Yes sir.

Q. Prior to the 22nd day of November 1899, was there
211 any order made by the district court for the southern district of Georgia with reference to the jury-box in relation to putting names into or revising it?

A. No, sir.

Q. Will you be kind enough to tell me how many names there were of the 562 put in that box—that being the total number as I understand—how many names there were of persons from the county of Chatham?

A. I have not the memorandum here. I made a statement to that effect.

Q. You sent me a memorandum?

A. Yes sir; I made a statement.

Q. (Paper handed witness.) Is that it?

A. 291 from Chatham county.

Q. And how many from the county of Glynn?

A. 14.

Q. That makes a total of how many from those two counties?

A. 305.

Q. The total number in the box was how many?

A. 562.

Q. And from the 12 other counties of that division, other than Chatham and Glynn, how many names were put in this box in 1897?

A. 257.

Q. Mr. Gillespie, after the revision of this box when was the first jury for the district court for the southern district of Georgia, eastern division, drawn?

A. July 3rd, 1897. That is, for the grand jury, and also the same date for the traverse jury.

Q. The traverse or petit jury?

A. Yes sir.

Q. Have you here, copied from the original records of the
212 district court, of which you are deputy clerk, copies of these venires, or those drawings?
A. Yes sir.
Q. Will you let me have that; the first jury?
A. That is the first one, (producing paper).
Q. These copies are made by you and they are correct?
A. Yes sir; they were not made by me personally.
Q. You have compared them?
A. I have compared them and can swear that they are correct.

Mr. ROSE: I offer these two papers in evidence, being the venires for the grand and traverse jury drawn for the eastern division of the southern district of Georgia, both dated July 3rd 1897.

Mr. ERWIN: I desire to ask Mr. Gillespie a question or two on this.

(By Mr. ERWIN:)

Q. Mr. Gillespie, I see some corrections on these copies, one place the name E. D. Whittier written in typewriter is changed in ink to E. D. Miltier?
A. Miltier is the proper name.
Q. Is that correction made by you?
A. Yes, sir; the original was Miltier.
Q. Another place where the typewriter has got Zachana Deal; that is changed to Zachariah?
A. Zachariah Deal.
Q. Is that correction made by you?
A. Yes sir; I knew the man.

Q. These mistakes that you have corrected were made
213 by the typewriter in copying them?
A. Yes sir.
Q. And are correct now as it stands?
A. Yes sir; correct with the original.

Mr. ERWIN: I object to these on the same grounds as the general line of testimony he is entering upon, and second, because the testimony is irrelevant and immaterial.

Objection overruled.

Ex. M 5. S. H. Nov. 8, 1900.

In the District Court of the United States for the Eastern Division of the Southern District of Georgia, May Term.

In re THE GRAND JURY.

Names of Persons Drawn in Open Court to Serve as Grand Jurors in said District Court at the May Term, 1897.

1	E. M. Smith,	Thomasville,	Ga.	Thomas	county.
2	William T. Leopold,	Savannah,	"	Chatham	"
3	John T. Rowland,	Savannah,	"		
4	J. C. Hatcher, Sr.,	Mt. Pleasant,	"		
5	R. R. Oakman,	Savannah,	"	Chatham	"
6	A. C. McDonell, (c.)	Savannah,	"	"	"
7	Abram W. Harmon,	Savannah,	"	"	"
8	J. L. Jones, (c.)	Savannah,	"	"	"
9	John F. Freeman,	Savannah,	"	"	"
10	E. D. Miltier,	Savannah,	"	"	"
11	H. T. Dunn,	Brunswick,	"	Glynn	"

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12	William C. Frippe,	Savannah,	Ga.	Chatham	county.
13	H. J. Solomons,	Homerville,	"	Clinch	"
14	W. E. McCallum,	Savannah,	"	Chatham	"
15	Lawrence Kelly,	Savannah,	"	Chatham	"
16	W. C. MacIntyre,	Thomasville,	"	Thomas	"
17	Zachariah Deal,	Fleming,	"	Liberty	"
18	Walter C. Askew,	Savannah,	"	Chatham	"
19	R. H. Crawford,	Steam Mill,	"	Decatur	"
20	Calhoun T. Morrell,	Savannah,	"	Chatham	"
21	G. S. Darley,	Homerville,	"	Clinch	"
22	Francis H. Marshal,	Savannah,	"	Chatham	"
23	Samuel H. Morgan,	Guyton,	"	Effingham	"
24	N. M. Fitch,	Thomasville,	"	Thomas	"
25	T. E. Ferrebee, (c.)	Savannah,	"	Chatham	"
26	Edward A. Williams. (c.)	"	"	Chatham	"
27	W. G. Powell,	Cyrene,	"	Decatur	"
28	James Knox, Jr.,	Waycross,	"	Ware	"

EMORY SPEER,
U. S. Judge.

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G.

JOHN M. BARNES,
U. S. Marshal.

In the presence of
L. M. ERWIN,
Deputy Clerk.

Order for Venire.

In re SAME.

It is ordered by the court that the clerk issue a writ of *venire facias*, directing the marshal of the United States to summon the per-
215 sons whose names were drawn in open court this — day of July 1897, on the panel hereto annexed, to be and appear personally at the United States court-room in the city of Savannah, Georgia, on the 14th day of July A. D. 1897, at 10 o'clock in the forenoon of said day, then and there to be empaneled and sworn as grand jurors to serve in a district court of the United States for said division, then and there to be holden.

In open court this 3rd day of July A. D. 1897.

EMORY SPEER,
U. S. Judge.

d. 433 G.

Ex. N 5. S. H. Nov. 8, 1900.

In the District Court of the United States for the Eastern Division of the Southern District of Georgia, May Term, 1897.

In re THE TRAVERS JURY.

Names of Persons Drawn in Open Court to Serve as Travers Jurors in said District Court at the May Term, 1897.

1	William McRee,	Lowndes county.
2	W. R. Mallon,	Ware "
3	Cornelius V. Snedeker,	Chatham "
4	Duncan V. Tomlinson,	Clinch "
5	D. D. Fiveach,	Clinch "
6	Milton M. Smith,	Liberty "
7	Henry Turner,	Brooks "
8	Willard C. Offutt,	Chatham "

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9	W. L. Richardson,	Chatham county.
10	C. H. Ramsey,	Brooks "
11	Statin B. Tomlinson,	Clinch "
12	A. L. Stokes,	Chatham "
13	W. H. Bourne,	Chatham "
14	Henry G. Buford,	Chatham "
15	Joseph E. De Lancy,	Chatham "
16	F. M. Young,	Ware "

EMORY SPEER,
U. S. Judge.

JOHN M. BARNES,
U. S. Marshal.

In the presence of
CECIL MORGAN,
Deputy Clerk.

G.

In re SAME.

Order for Venire.

It is ordered by the court that the clerk issue a writ of *venire facias*, directing the marshal of the United States to summon the persons who- names were drawn in open court this 3rd day of July 1897, on the panel hereto annexed, to be and appear personally at the United States court-room in the city of Savannah, Georgia on the 14th day of July 1897 A. D. *1897* at 10 o'clock a. m., then and there to be empaneled and sworn as travers jurors to serve in the district court of the United States for said division, then and there to be holden.

In open court this 3rd day of July A. D. 1897.

EMORY SPEER,
U. S. Judge.

D. C. 434.

217 (By Mr. ROSE:)

Q. Mr. Gillespie, tell us how many grand jurors were drawn from this box, as appears by Exhibit "M 5," in July 1897?

A. 28.

Q. How many of them were from Chatham and Glynn counties respectively?

A. 15 from Chatham and 1 from Glynn.

Q. How many trial jurors were there drawn at the same time, as appears by Exhibit "N 5,"

A. Fifteen.

Q. How many from Chatham and Glynn respectively?

A. Seven from Chatham and none from Glynn.

Q. Now you have stated that there was 15 from Chatham and one from Glynn in the grand jury. How many from the other counties; 12, isn't it?

A. Yes sir, 12.

Q. And 7 from Chatham county out of the sixteen would leave nine from the other counties?

A. Yes sir.

Q. When was the next grand jury drawn for the eastern division; the next jury drawn?

A. Drawn February 23rd 1898, returnable March 3rd, 1898.

Q. Grand and petit both?

A. Yes sir; at the same time. No sir; beg pardon. The travers jury was drawn on February 23rd, returnable March 1st.

Q. I don't care about the return day. How many grand jurors were drawn?

A. Thirty.

Q. How many of those from Chatham and how many from Glynn counties?

A. Thirteen.

Q. Thirteen from Chatham?

A. Yes sir.

Q. How many from Glynn?
A. None.
218 Q. That would leave 17 from the other counties?
A. Seventeen, yes sir.
Q. How many trial jurors were drawn?
A. Nineteen.
Q. How many from Chatham and how many from Glynn?
A. Five from Chatham and none from Glynn.
Q. That would be fourteen from the other counties, being 5 from nineteen?
A. 14, yes sir.
Q. These two papers being copies of venires, are made by you or compared by you, and they are correct, are they?
A. Yes sir.
Q. The changes that appear to be made in ink, are changes made by you on comparison, the typewriting having been a mistake?
A. Yes sir.

Mr. ROSE: I offer those two papers in evidence.
Mr. ERWIN: The same objection to the general line of testimony and also to the admissibility of the papers for irrelevancy and immateriality.
Objection overruled. Exception taken.

Ex. O 5. S. H. Nov. 8th, 1900.

In the District Court of the United States for the Eastern Division, Southern District of Georgia, February Term, 1898.

In re THE GRAND JURY.

Names of Persons Drawn in Open Court to Serve as Grand Jurors in said District Court at the February Term, 1898.

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1	Joseph P. Tomlinson,	Du Pont,	Clinch	county.
2	George P. Jones,	Gayton,	Effingham	"
3	James F. Lewis,	Savannah,	Chatham	"
4	J. W. Simons,	Du Pont,	Clinch	"
5	James Bell,	Whigham,	Decatur	"
6	George B. Lewis,		Chatham	"
7	C. H. Hughes,	Du Pont,	Clinch	"
8	Frank H. Morse,	Savannah,	Chatham	"
9	J. H. Deveaux (c.)	Savannah,	Chatham	"
10	S. J. Warren,	Brinson,	Decatur	"
11	Nicholas Paulsen,	Savannah,	Chatham	"
12	Henry H. Hull,	Savannah,	Chatham	"
13	John T. Evans,	Savannah,	Chatham	"
14	G. M. Archer,	Waycross,	Ware	"
15	Frank B. Bevill,		Chatham	"
16	Norman C. Hendry,	Valdosta,	Lowndes	"
17	Wm. M. Bohan,	Savannah,	Chatham	"

18	Robert Hernandez (c.)	Savannah,	Chatham	"
19	Wm. L. Grayson,	Savannah,	Chatham	"
20	W. W. McCully,	Waycross,	Ware	"
	G			
21	James M. Briggs,	Valdosta,	Lowndes	"
22	George W. Taylor,	Blackshear,	Pierce	"
23	Wm. H. Adams,		Chatham	"
24	A. Gordon Cassels,		Chatham	"
25	W. M. Austin,	Jessup,	Wayne	"
26	C. L. Funderbunk,	Brinson,	Decatur	
27	A. S. Pearson,	Avant,	Pierce	"
28	W. R. Brown,	Brinson,	Decatur	"

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29	Joseph E. Joyner,	Jessup,	Wayne	county.
30	John S. Fleming,	Walthourville,	Liberty	"

EMORY SPEER,
U. S. Judge.

R. D. LOCKE,
Deputy Marshal.

In the presence of
L. M. ERWIN,
Deputy Clerk.

In re SAME.

Order for Venire.

It is ordered by the court that the clerk issue a writ of *venire facias*, directing the marshal of the United States to summon the persons whose names were drawn in open court this — day of February 1898, on the panel hereto annexed, to be and appear personally at the United States court-room in the city of Savannah, Georgia, on the third day of March A. D. 1898, at 9 o'clock in the forenoon of said day, then and there to be empaneled and sworn as grand jurors to serve in a G district court of the United States for said division, then and there to be holden.

In open court Feb'y 23rd 1898.

EMORY SPEER,
U. S. Judge.

Ent. D. C., 470, 471.

UNITED STATES OF AMERICA,
For Eastern Division of the Southern District of Georgia.

The President of the United States to the marshal of the
221 United States for the southern district of Georgia, Greeting:

You are hereby commanded to summon the several persons named in the panel hereto annexed, personally — be and appear at a

district court of the United States for the eastern division of the southern district of Georgia, to be holden in the United States court-room in the city of Savannah, Georgia, in and for said division and district on the third day of March, A. D. 1898, at 9 o'clock in the forenoon of that day, then and there to be empaneled and sworn as grand jurors, to serve at the February term 1898 of said district court.

And have you then and there this writ, with your proceedings endorsed thereon.

L. S. of the Court. (Seal.) Witness the Honorable Emory Speer, judge of the district court of the United States, at Macon, this the 23rd day of February A. D. 1898.

L. M. ERWIN,
Deputy Clerk.

G.

(Endorsed:) Marshal's No. 451: In the district court of the United States for the eastern division of the southern district of Georgia: *In re* the grand jury: *Venire facias* for February term 1898: Issued Feb'y 23 1898. Returnable March 3rd 1898: Returned by marshal and filed this 3rd day of March 1898. S. F. B. Gillespie, dep. clerk: G.

222 Ex. P 5. S. H.

In the District Court of the United States for the Eastern Division, Southern District of Georgia, February Term, 1898.

In re THE TRAVERS JURY.

Names of Persons Drawn in Open Court to Serve as Travers Jurors in said District Court at the February Term, 1898.

1	Daniel C. Newton,	Savannah,	Chatham county.
2	John F. La Far,	Savannah,	Chatham "
3	G. B. Trulock,	Whigham,	Decatur "
4	William F. Train,	Whigham,	Decatur "
5	Wm. C. Workman,	Whigham,	Decatur "
6	Joseph Hull,	Whigham,	Decatur "
7	Walter D. Thomas,	Whigham,	Decatur "
8	W. R. Causey,	Jessup,	Wayne "
9	Thos. J. Holt,	Savannah,	Chatham "
10	James Brown,	Blackshear,	Pierce "
11	Clinton D. Groover,	Quitman,	Brooks "
12	S. C. Allen,	Statesboro,	Bulloch "
13	T. W. Faircloth,	Sofkey,	Decatur "
14	Walter T. Lane,	Valdosta,	Lowndes "
15	Harry S. Dreese,	Savannah,	Chatham "
16	J. H. Davidson,	Thomasville,	Thomas "
17	F. C. Owens,	Waycross,	Ware "

18 Andrew T. Kelly, Savannah, Chatham "
19 P. G. Brinson, Iron City, Decatur "

EMORY SPEER,
U. S. Judge.

R. D. LOCKE.

223 In the presence of
L. M. ERWIN,
Deputy Clerk.

G.

In re SAME.

Order for Venire.

It is ordered by the court that the clerk issue a writ of *venire facias*, directing the marshal of the United States to summons the persons whose names were drawn in open court this 23rd day of February 1898, on the panel hereto annexed, to be and appear personally at the United States court-room in the city of Savannah, Georgia, on the first day of March A. D. 1898, at 9 o'clock in the forenoon of said day, then and there to be empaneled and sworn as travers jurors to serve in a district court of the United States *court of the United States* for said division, then and there to be holden.

In open court Feb'y 23rd 1898.

EMORY SPEER,
U. S. Judge.

UNITED STATES OF AMERICA,
For Eastern Division of the Southern District of Georgia.

The President of the United States to the marshal of the United States for the southern district of Georgia, Greeting:

224 You are hereby commanded to summon the several persons named in the panel hereto annexed, personally to be and appear at a district court of the United States for the eastern division of the southern district of Georgia, to be holden in the United States court-room in the city of Savannah, Georgia, in and for said division and district on the first day of (being the — day) *in* March A. D. 1898, at 9 o'clock in the forenoon of that day, then and there to be empaneled and sworn as travers jurors, to serve at the —— term 189– of said district court.

And have you then and there this writ, with your proceedings endorsed thereon.

Witness the Honorable Emory Speer, judge of the district court of the United States, at Macon, this the 23rd day of February A. D. 1898.

[L. S.]
[SEAL.]

LENOIR M. ERWIN,
Deputy Clerk.

G.

(Endorsed:) No. 4 in the district court of the United States for the eastern division of the southern district of Georgia: *In re* the

travers jury: *Venire facias* for February term 1898: Issued Feb'y 23rd 1898. Returnable March 1st 1898: Returned by marshal and filed this 1st day of March 1898. S. F. B. Gillespie, dep'y clerk.

G.

225 Q. When was the next grand and petit jury, or both, drawn for the eastern division?

A. January 4th 1899.

Q. Grand and petit both?

A. Yes sir.

Q. Have you copies of the venires there?

A. Yes sir.

Q. Are those copies compared by you with the originals?

A. Yes sir.

Q. And they are correct?

A. Yes sir.

Mr. Rose: I offer them in evidence.

Same objection, ruling and exception.

Ex. Q 5. S. H. Nov. 8, 1900.

In the District Court of the United States for Eastern Division, Southern District of Georgia, November Term, 1898.

In re The Grand Jury.

Names of Persons Drawn in Open Court to Serve as Jurors in said Court at the November Term, 1898.

1	J. A. Fulcher,	Statesboro,	Bulloch county.
2	Benjamin F. Lockwood,	Savannah,	Chatham "
3	D. V. Levy,	Savannah,	Chatham "
4	John C. Haile,	Savannah,	Chatham "
5	George C. Goebel,	Savannah,	Chatham "
6	B. D. Southcott,	Savannah,	Chatham "
7	David C. Allen,	Savannah,	Chatham "
8	B. J. Simans,	Du Pont,	Clinch "

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9	F. M. Young,	Waycross,	Ware county.
10	Joseph B. Tomlinson,	Du Pont,	Clinch "
11	David A. Bruce,	Isom,	Brooks "
12	Charles E. Fryermuth,	Springfield,	Effingham "
13	Patrick Tuberdy,	Savannah,	Chatham "
14	John G. Smith,	Jessup,	Wayne "
15	Thomas J. Shone,	Fleming,	Liberty, "
16	Joseph J. Bell,	Jessup,	Wayne "
17	Robert P. Mallery,	Clyo,	Effingham "
18	J. W. Mallon,	Waycross,	Ware "
19	Geo. L. Appleton,	Savannah,	Chatham "
20	Charles Ellis, Jr.,	Savannah,	Chatham "

21 O. F. Littlefield,	Jessup,	Wayne	"
22 Alexander F. Flint,	Savannah,	Chatham	"
23 C. Malcolm Cunningham,	Savannah,	Chatham	"
24 Wm. H. Berry,	Savannah,	Chatham	"
25 John F. Know,	Blackshear,	Pierce	"
26 M. Kiser,	Brunswick,	Glynn	"
27 Y. M. Milledge,	Savannah,	Chatham	"
28 B. F. Jones,	Lulaton,	Wayne	"
29 Geo. S. Roach,	Johnson Station,	Liberty	"
30 Berrien Beaty,	Quitman,	Brooks	"

EMORY SPEER,
U. S. Judge.

In the presence of—
L. M. ERWIN,
Deputy Clerk.
R. D. LOCKE,
Chief Office, Dep. Marshal.

227 *In re* SAME.

Order for Venire.

It is ordered by the court that the clerk issue a writ of *venire facias*, directing the marshal of the United States to summon the persons whose names were drawn in open court this 4th day of January 1899, on the panel hereto annexed, to be and appear personally at the United States court-room in the city of Savannah, Georgia, on the tenth day of January A. D. 1899, at 9 o'clock in the forenoon of said day, then and there to be empaneled and sworn as grand jurors to serve in a district court of the United States for said division, then and there to be holden.

In open court January 4th 1899.

EMORY SPEER,
U. S. Judge.

G.

UNITED STATES OF AMERICA, }
Eastern Division of the Southern District of Georgia. }

The President of the United States to the marshal of the United States for the southern district of Georgia, Greeting:

You are hereby commanded to summon the several persons named in the panel hereto annexed, personally to be and appear at a district court of the United States for the eastern division of the southern district of Georgia to be holden in the United States court-
228 room in the city of Savannah, Georgia, in and for said division and district, on the second Tuesday (being the tenth day) in January A. D. 1899, at 9 o'clock in the forenoon of said day, then and there to be empaneled and sworn as grand jurors, to serve at the November term 1899 of said district court.

And have you then and there this writ, with your proceedings endorsed thereon.

(L. S. of the Court.) U. S.

Witness the Honorable Emory Speer, judge of the district court of the United States, at Savannah, in said division and district, this the fourth day of January, A. D. 1899.

L. M. ERWIN,
Deputy Clerk.

(Endorsed:) No. 5 In the district court of the United States for the eastern division of the southern district of Georgia: *In re* the grand jury: *Venire facias* for November term 1898: Issued January 4th 1899. Returnable January 10th 1899; Returned by marshal and filed this — day of —— 189– —— —— clerk.

G.

Ex. R 5. S. H. Nov. 8, 1900.

In the District Court of the United States for Eastern Division, Southern District of Georgia, November Term, 1898.

229 *In re* THE TRAVERS JURY.

Names of Persons Drawn in Open Court to Serve as Travers Jurors in said District Court at the November Term, 1898.

1	John C. Sneed, (c.)	Chatham county,	Savannah.
2	Ambrose Ehrlich,	Chatham "	Savannah.
3	Patrick H. Kiernan,	Chatham "	Savannah.
4	Abiel F. Winn,	Liberty "	Dorchester.
5	John Morrison,	Bryan "	Ellabelle.
6	Thomas B. Moore,	Bryan "	Belknap.
7	A. V. Wood,	Glynn "	Brunswick.
8	James G. Hardee,	Chatham "	Savannah.
9	James Watt,	Thomas "	Thomasville.
10	James H. Dugger,	Bryan "	Ellabelle.
11	Thomas B. Ervin,	Chatham "	Savannah.
12	S. W. Freeman,	Decatur "	Donalsonville.
13	John G. Robertson,	Chatham "	Savannah.
14	Robert M. Hull,	Chatham "	Savannah.
15	G. S. Darley,	Clinch "	Homerville.
16	C. S. Hanks,	Brooks "	Quitman.
17	Adolph M. Lefler,	Chatham "	Savannah.
18	Paul H. Lynch,	Chatham "	Savannah.

EMORY SPEER,
U. S. Judge.

In the presence of
CECIL MORGAN,
Deputy Clerk U. S. Ct.
R. D. LOCKE,
Chief Office, Dep. Marshal.

G.

230 *In re* SAME.

Order for Venire.

It is ordered by the court that the clerk issue a writ of *venire facias* directing the marshal of the United States to summon the persons whose names were drawn in open court this 4th day of January 1899, on the panel hereto annexed, to be and appear personally at the United States court-room, in the city of Savannah, Georgia, on the 10th day of January A. D. 1899, at 9 o'clock in the forenoon of said day, then and there to be empaneled and sworn as travers jurors to serve in a district court of the United States for said division, then and there to be holden.

In open court Jan'y 4, 1899.

EMORY SPEER,
U. S. Judge.

D. C. 555. G.

UNITED STATES OF AMERICA,
Eastern Division of the Southern District of Georgia.

The President of the United States to the marshal of the United States for the southern district of Georgia, Greeting:

You are hereby commanded to summon the several persons named in the panel hereto annexed, personally to be and appear at a district court of the United States for the eastern division of
231 the southern district of Georgia, to be holden in the United States court-room, in the city of Savannah, Georgia, in and for said division and district, on the second Tuesday (being the tenth day) in January A. D. 1899, at 9 o'clock in the forenoon of that day, then and there to be empaneled and sworn as travers jurors, to serve at the November term 1898 of said district court.

And have you then and there this writ with your proceedings endorsed thereon.

(L. S. of the Court.) Witness the Honorable Emory Speer, judge of the district court of the United States, at Savannah, in said division and district, this 4th day of January A. D. 1899.

U. S.

L. M. ERWIN,
Deputy Clerk.

(Endorsed:) No. 6 In the district court of the United States for the eastern division of the southern district of Georgia. *In re* the travers jury: *Venire facias* for November term 1898. Issued January 4, 1899. Returnable January 10, 1899. Returned by marshal and filed this — day of —— 189- —— —— clerk.

G.

Q. How many grand jurors were drawn at the drawing January 4th 1899?

A. Thirty.

Q. How many from Glynn and how many from Chatham?

A. Twelve from Chatham and one from Glynn.

232 Q. And that would leave 17 from the other counties?

A. Seventeen.

Q. How many trial jurors were drawn?

A. Eighteen.

Q. How many from Chatham and how many from Glynn?

A. Eight from Chatham and none from Glynn.

Q. That would be 10 from the other counties?

A. Ten.

Q. When was the next jury drawn for this division of this district?

A. May 19th 1899.

Q. Grand and petit?

A. Both.

Q. How many grand jurors and how many from Chatham and how many from Glynn?

A. Thirty altogether; 17 from Chatham and none from Glynn.

Q. That would leave 13 from the other counties?

A. Thirteen, yes sir.

Q. How many trial jurors were drawn?

A. Twenty-six.

Q. How many from Chatham and how many from Glynn?

A. Twenty from Chatham and none from Glynn.

Q. That left six from the other counties?

A. Six, yes.

Mr. ROSE: I offer these two venires for the drawing of May 19th 1899, in evidence.

Same objection, ruling, and exception.

Ex. S 5. S. H. Nov. 8th, 1900.

233 In the District Court of the United States for Eastern Division, Southern District of Georgia, May Term, 1899.

In re THE — JURY.

Names of Persons Drawn in Open Court to Serve as Travers Jurors in said District Court at the May Term, 1899.

			P. O.
1	Henry G. Buford,	Chatham county,	Pooler.
2	William D. Dixon,	" "	Savannah.
3	C. A. L. Cunningham,	" "	"
4	Williard C. Offutt,	" "	"
5	Frederick Einsfield,	" "	"
6	Augustus M. Glover,	" "	"
7	George A. Gordon,	" "	"
8	Frank B. Papy,	" "	"
9	Ferrett W. Dixon, G	" "	"
10	E. M. Smith,	Thomas "	Thomasville.
11	C. W. Albritton,	Wayne "	Waynesville.
12	C. R. Ashley,	Lowndes "	Valdosta.

13	John A. Hutton,	Chatham	"	Savannah.
14	S. A. Jones,	Thomas	"	Thomasville.
15	Kin Braswell,	Decatur	"	Fairchilds.
16	A. B. Moore,	Chatham	"	Savannah.
17	Michael J. Barrett,	"	"	"
18	James B. Floyd,	"	"	"
19	Hal H. Bacon,	"	"	"
20	John W. Habersham, (c.) G	"	"	"
21	Wm. C. Fripp,	Chatham	"	Savannah.
22	Benj. F. Morgan,	"	"	Kingsville.

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23	Hugh Logan,	Chatham county,		Savannah.
24	Thos. E. Bessellieu,	"	"	"
25	Horace Rivers,	"	"	"
26	Jesse C. Touchton,	Clinch	"	Stockton.

EMORY SPEER,
U. S. Judge.

In the presence of—
M. ERWIN, *U. S. Att'y.*
R. D. LOCKE,
Chief Deputy Marshal.

In re SAME.

Order for Venire.

It is ordered by the court that the clerk issue a writ of *venire facias*, directing the marshal of the United States to summon the persons whose names were drawn in open court this 19th day of May, 1899, on the panel hereto annexed, to be and appear personally at the United States court-room in the city of Savannah, Georgia, on Tuesday, May 23d, A. D. 1899, at 9.30 o'clock in the forenoon of said day, then and there to be empaneled and sworn as travers jurors to serve in a district court of the United States for said division, then and there to be holden.

In open court May 19th, 1899.

EMORY SPEER,
U. S. Judge.

D. C. 44, 45. G.

UNITED STATES OF AMERICA,
Eastern Division of the Southern District of Georgia.

235 The President of the United States to the marshal of the United States for the southern district of Georgia, Greeting:

You are hereby commanded to summon the several persons named in the panel hereto annexed, personally to be and appear at a district court of the United States for the eastern division of the southern district of Georgia, to be holden in the United States court-

room in the city of Savannah, Georgia, in and for said division and district, on Tuesday (being the twenty-third day) in May, A. D. 1899, at 9 o'clock in the forenoon of that day, then and there to be empaneled and sworn as travers jurors, to serve at the May term 1899 of said district court.

And have you then and there this writ with your proceedings endorsed thereon.

(L. S. of the Court.) Witness the Honorable Emory Speer, judge of the district court of the United States, at Savannah, in said division and district, this 19th day of May, A. D. 1899.

U. S. L. M. ERWIN,
Deputy Clerk.

G.

(Endorsed:) No. 8 In the district court of the United States for the eastern division of the southern district of Georgia. *In re* the travers jury. *Venire facias* for May term 1899. Issued May 19th 1899. Returnable —— —, 189–. Returned by marshal and filed this 23d day of May 1899. S. F. B. Gillespie, deputy clerk. G.

Ex. T 5. S. H. Nov. 8th, 1900.

In the District Court of the United States for Eastern Division, Southern District of Georgia, May Term, 1899.

In re THE GRAND JURY.

Names of Persons Drawn in Open Court to Serve as Grand Jurors in said District Court at the May Term, 1899.

1	John D. Carswell,	Savannah,	Chatham	county.
2	Claude H. Troutman,	Quitman,	Brooks	"
3	Richard M. Courtney,	Savannah,	Chatham	"
4	John Balen (c.)	Savannah,	Chatham	"
5	Joseph W. McFarland,	Savannah,	Chatham	"
6	Spencer P. Shotter,	Savannah,	Chatham	"
7	Alfred F. King,	Savannah,	Chatham	"
8	James L. Beck,	Savannah,	Chatham	"
9	Thomas P. Keck,	Savannah,	Chatham	"
10	M. J. Kennidy,	Excelsior,	Bullock	"
11	C. H. Ramsey,	Quitman,	Brooks	"
12	P. M. Childress,	Valdosta,	Lowndes	"
13	John M. Shearouse,	Guyton,	Effingham	"
14	Max L. Byck,	Savannah,	Chatham	"

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15	J. B. Sheftall, (c.)	Savannah,	Chatham	county.
16	D. W. Lane,	Brinson,	Decatur	"
17	J. Hamp. Bennett,	Jessup,	Wayne	"
18	Jno. C. Normian,	Walthourville,	Liberty	"

19	Calhoun T. Morel,	Savannah,	Chatham	"
20	Adam C. Harmon,	Savannah,	Chatham	"
21	Geo. R. Youmans,	Waycross,	Ware	"
22	Paul T. Haskell,	Ways Sta. (Sav.)	Bryan	"
23	Michael F. Foley,	Savannah,	Chatham	"
24	Armin B. Palmer.	Savannah,	Chatham	"
25	W. G. Powell,	Cyrene,	Decatur	"
26	Nat. A. Briggs,	Valdosta,	Lowndes	"
27	W. M. Wilson,	Waycross,	Ware	"
28	Augustus H. Kelly,	Savannah,	Chatham	"
29	John E. Burgess,	Savannah,	Chatham	"
30	Joseph F. Emery,	Savannah,	Chatham	"

EMORY SPEER,
U. S. Judge.

In the presence of
R. D. LOCKE,
Chief Dep. Mar.
M. ERWIN, *U. S. Att'y.*

In re SAME.

Order for Venire.

It is ordered by the court that the clerk issue a writ of *venire facias*, directing the marshal of the United States to summon the persons whose names were drawn in open court this 19th day of May 1899, on the panel hereto annexed, to be and appear personally at the United States court-room in the city of Savannah, Georgia,
238 on *the* Monday May 23d A. D. 1899, at 9.30 o'clock in the forenoon of said day, then and there to be empaneled and sworn as grand jurors to serve in a district court of the United States for said division, then and there to be holden.

In open court May 19, 1899.

EMORY SPEER,
U. S. Judge.

D. C. 42, 44. G.

UNITED STATES OF AMERICA, }
Eastern Division of the Southern District of Georgia. }

The President of the United States to the marshal of the United States for the southern district of Georgia, Greeting:

You are hereby commanded to summon the several persons named in the panel hereto annexed, personally to be and appear at a district court of the United States for the eastern division of the southern district of Georgia, to be holden in the United States court-room in the city of Savannah, Georgia, for said division and district, on Tuesday (being the twenty-third day) in May A. D. 1899, at 9.30 o'clock in the forenoon of that day, then and there to be empaneled and sworn as grand jurors, to serve at the May term 1899, of said district court.

And have you then and there this writ with your proceedings endorsed thereon.

239 Witness the Honorable Emory Speer, judge of the district court of the United States at Savannah, in said division and district this the 19th day of May A. D. 1899.

L. M. ERWIN,
Deputy Clerk.

U. S. G.

(Endorsed:) No. 7. In the district court of the United States for the eastern division of the southern district of Georgia. *In re* the grand jury. *Venire facias* for May term 1899. Issued May 19th, 1899. Returnable —— —, 189–. Returned by marshal and filed this 23d day of May 1899. S. F. B. Gillespie, deputy clerk. G.

Q. Mr. Gillespie, will you be kind enough to add up the total number of jurors drawn for these four drawings, grand and petit?

A. Not separate?

Q. No, not separate. Before you do that, these jurors, grand and petit were drawn from the same box?

A. Yes, sir.

Q. And there is only one district-court jury-box for that division?

A. Only one.

Mr. ERWIN: That is a question of law, may it please your honor. There can be but one technical jury-box, but the law provides that the juries of the circuit and district courts can be used interchangeably.

240 The COMMISSIONER: There is no question about that.

Mr. ROSE: Not a bit. You don't pretend that the circuit-court box was used here, do you?

The COMMISSIONER: No; but his point is that they can draw a jury interchangeably out of either one.

Mr. ROSE: He says there was only one used here.

Mr. ERWIN: Used in this particular drawing you mean?

Mr. ROSE: Yes.

A. 197 is the total.

Q. How many of those are from Chatham?

A. 97.

Q. How many from Glynn?

A. Two, I believe.

Q. And from the other counties would be then 98?

A. 98, yes sir.

Q. Was the circuit-court box used, Mr. Gillespie, in drawing any of these jurors?

A. No sir.

Q. You had the custody of the box during these times?

A. Yes sir. Well, I say they were not drawn because the names were on the district-court jury, and it was customary to send the boxes away; both boxes.

Q. But they were on the district-court jury-list and not on the circuit court?

A. That is right; not on the circuit court.

Q. Mr. Gillespie, there being 562 names originally in the box put there in May 1897, after the drawing of May 19th 1899, how
241 many names had not been drawn from the box; please deduct 197 from 562?

A. Up to what time.

Q. Up to and including the drawing of May, 1899?

A. 365.

Q. The next drawing that was had from that box was when?

A. December 4th 1899.

Q. That is the jury, but the drawiug was on what date; November 22nd isn't it, the date of the venire?

A. I haven't it here. You have a certified copy of it I think. (Paper shown witness.) 22nd of November 1899.

Q. That was the next venire?

A. Yes sir.

Q. The jury drawn under that venire of November 22nd 1899 met when?

A. December 4th 1899.

Q. And when were they discharged; after December 8th?

A. December 11th.

Q. Do you recollect, Mr. Gillespie, who was the foreman of the grand jury that met on December 4th 1899?

A. Thomas S. McKay, of Valdosta, Lowndes county.

Q. Is that name one of the names drawn by the venire you have in your hand of the 22nd of November 1899?

A. Yes sir.

Q. Then there was no other grand jury between May 19th 1899, and the one of which Mr. McKay was the foreman?

A. No sir.

Q. Mr. Gillespie, if in the 562 names put in the box in the manner that you have described in the spring of 1897, you have testified there were 291 of the 562 from Chatham county?

A. No sir; 197.

242 Q. No. You testified before there were 291 on this book from Chatham county?

A. Yes; I understand you.

Q. Now you have also testified that of those drawn at the four drawings that you have given, there were 97 drawn from Chatham county.

A. 97, yes.

Q. How many did that leave in the box on the morning of the 22nd of November 1899, from Chatham county; please deduct 97 from 291?

Mr. ERWIN: I object to that question because it is a double question. He asks him in the first place to deduct the entire number of jurors drawn from July 1897, to the last drawing for the December 1899 jury, and asks how much would that leave in the box, and

then he asks him on top of that to deduct 97 from the total amount. Now I object to it because it does not follow under the testimony that that simple substraction which he asks from him even will answer the first question. If as the law provides that grand jurors may serve after two years and petit jurors after one year's interregnum, and as the testimony of the other deputy clerk who they brought here is that it was customary after the two years had elapsed to return the tickets to the box if the original jurors first drawn were returned to the box and should be drawn over at this last drawing, it would not be a question of simple substraction and the answer to the last question would mislead as to the first.

243 The COMMISSIONER: Put the first question first.

Mr. ROSE: There is no first question first. There is simply one question.

Objection overruled, exception taken.

Mr. ERWIN: Is the question simply, Deduct 97 from 291, or is it the balance of the question?

Mr. ROSE: Well, that had not been drawn.

A. That would leave 194.

The COMMISSIONER: It would leave 194 in the wheel when?

Mr. ROSE: On the morning of the 22nd of November, from Chatham county. I am confining myself to that.

The WITNESS: I was going to say, provided there were no tickets returned to the box.

Q. You have testified that the jury commissioner and the clerk did not return any to the box?

Mr. ERWIN: He has not testified any such thing.

Mr. ROSE: He has testified to that; that the box was made but one revision, and Elliott never did anything but the one time.

The WITNESS: That is all.

Q. That is right, isn't it?

A. I can explain that.

Q. You have testified so, that Elliott never had anything to do with the box except on the one occasion?

A. Yes sir.

244 Mr. ERWIN: He can't testify to that because in the first place—

The COMMISSIONER: As far as his knowledge is concerned, is what he says:

Mr. ERWIN: Yes, but whether or not Elliott was present in court when the two years had expired and the judge returned them, or whether he was or not, the clerk was present in court.

The COMMISSIONER: The witness is only speaking of his own knowledge.

Mr. ERWIN: He has testified as if he was there all the time and he has not qualified, and Mr. Rose is making him apply to that state of affairs and it is all testimony relating to the jury-lists and not return of the tickets to the box.

The COMMISSIONER: Your cross-examination will bring that out.

Mr. ROSE: The proof is that the judge, if anybody did, took them from the envelopes and put them in the box, and he had no more right to do that than you have, or I have. I am not afraid of it and you need not be so afraid of it. I will show you how you draw juries down South there under the law.

Mr. ERWIN: I am not worried about it.

Q. That left in the box 194 that had not been drawn prior to November 22nd 1899?

A. Yes sir; that would be right.

245 Q. How many had been drawn from Glynn county on these four drawings?

A. Two.

Q. How many was there in the box originally from Glynn county?

A. Fourteen.

Q. How many did that leave in the box that had not been drawn?

A. Twelve.

Q. Please add the 194 to the twelve and get the total that had not been drawn from Chatham and Glynn counties?

A. Two hundred and six.

Q. There was altogether in the box 365 that have not been drawn, as you have testified?

A. Yes sir.

Q. Please take 206 from 365?

A. One hundred and fifty-nine.

Q. So that on the morning of the 22nd of November 1899, there was in the jury-box 159 names which had not been drawn, which names were from the 12 counties in that division. Is that right?

A. There were that many; there were more probably.

Q. There were that many that had not been drawn, I am talking about?

A. I understand that; that had not been drawn.

Q. Now let's get at that in another way and verify it. You have testified there were 562 names in the box, have you not?

A. Yes sir.

Q. There were 305 from Chatham and Glynn counties; you have testified to that before?

A. 305, yes.

Q. That left 257 from the 12 counties covered by the order

246 of the 26th of January 1897, deducting as you did the 305 from the 562?

—. Yes sir, that is right.

Q. Now the total number of names drawn by these four drawings out of the box was how many?

A. One hundred and ninety-seven.

Q. No; I had not finished my question. From the counties other than Chatham and Glynn; from the same 12 counties. It was 98?

A. Ninety-nine.

Q. No, 98?

A. 97 from Chatham and 2 from Glynn.
Q. And 98 from the other counties?
A. Yes sir; that is right.
Q. 98, isn't it?
A. Yes sir.
Q. Deduct the 98 from the 257 and you get what?
A. 159.
Q. That is the same result that we arrived at by the other method?
A. Yes sir.
Q. How many names were there from the 12 counties—now I am excluding Chatham and Glynn—of grand and petit jurors drawn in July 1897?
A. Thirty-four.
Q. You do not understand my question. The number from the other counties; the 12 counties?
A. Twenty-one.
Q. And how many were there drawn from the other counties in February, 1898; from the 12 counties?
A. Thirty-one.
Q. The total number of that is how much? 21 and 31?
A. 52.
Q. Add 52 to 159?
A. 211.
247 Q. So that if the names from the counties other than Chatham and Glynn that had been drawn prior to January 4th 1899, had been returned to this box, how many would there have been in it then of names other than those from Chatham and Glynn; from the 12 counties?
A. 211.
Q. The next drawing, January 4th 1899, was within a year, was it not, of November 23rd 1899?
A. Yes sir.
Q. And under your practice no names drawn within a year were ever returned prior to the next drawing, was there?
A. Well, I am not sure about that, Mr. Rose. The judge's custom is to tear the envelopes up and put them back in the box. There is two partitions in the box, and I have never noticed whether he took one envelope or two.
Q. Don't you know that he did not put back in the box the names that had been drawn within a year prior to the time of the then drawing that was taking place?
A. He would not be apt to do so, but then I could not say that because I am on his right side when he draws them and making my venire.
Q. Now let me get this down in one nutshell. If no names had been put back in the box out of the names drawn after the box was revised by you, there would have been left in the box 159 names from the 12 counties named in this order, leaving out the counties of Chatham and Glynn?
A. Yes sir.

248 Q. If all the names that had been drawn from these 12 counties within a year prior to November 22nd 1899, had been returned to the box, there would have been 211 names in the box?

A. 211.

Q. Now when was the next order entered with reference to a jury being drawn. That has been put in evidence?

A. November 22nd.

Mr. ROSE: I don't know what the exhibit number is, but you have put that in evidence, the order for the drawing of the December grand jury.

Mr. ERWIN: We have one like that. I don't know what the number is myself.

Mr. ROSE: It has been put in evidence and I will lease it blank in my question.

Q. The Government has offered in evidence a certified copy from the files of the court of a letter from Marion Erwin, United States attorney, to Hon. Emory Speer, of date November 22nd 1899, and an order attached thereto made by Judge Speer dated that same day. Do you recognize that as being a copy of that letter and order (showing)?

A. Yes sir.

Q. Have you examined the records, Mr. Gillespie, to see whether from the time of the entry of the order of January 26th 1897, there was any other order with reference to the counties from which juries should be drawn, down to the time of the date of this order, November 22d 1899?

A. I have no record of any other order.

Q. You have examined the records for that purpose?

249 A. I cannot say that I have examined the records for that purpose, but I would know if it was on the minutes.

Q. You know there is no other order?

A. I know there is no other order on the minutes.

Q. On the 22d of November 1899, the date of that order, there was no jury commissioner for the eastern division of the southern district of Georgia, was there?

A. No sir.

Q. This order provides and requires for the grand jury to be drawn from the jury-box of the eastern division of the district, and so on, and that the said jurors be returned from the counties of the said eastern division, other than the counties of Chatham and Glynn. Was there ever a jury-box made, a jury-list made or prepared from the 26 counties in that division, excluding Chatham and Glynn?

A. No sir.

Q. And there being no jury commissioner at that date, no jury-box was ever prepared in compliance with that order, was there?

Mr. ERWIN: I object to that question because——

Mr. ROSE: I withdraw it.

Q. After November 22d 1899, and prior to December 4th 1899, was there a jury-box or a jury-list prepared from the counties of the eastern division, other than Chatham and Glynn?

A. Not to my knowledge.

Q. You have no record of any such box?

A. No.

Q. You have never seen any such box, have you?

A. No sir.

250 Mr. ERWIN: I again, may it please your honor, object to the question and answer because the learned counsel undertook to get the witness to construe the order in the previous question and then when I got up and objected to that he withdrew it. He, in the most subtle form put the question a second time and got the witness to answer before I had time to object.

Mr. ROSE: I didn't ask him to construe it. I asked him for the facts. I will construe it myself when I get ready.

Mr. ERWIN: He has put one question in which he asks the witness from the 26 or 28 counties in the district, and then turned around and asked him *him* the question from the counties in the district other than Chatham and Glynn. He put it following the other question so as to make the witness construe this order in the meaning of the other counties in the district instead of the counties other than Chatham and Glynn.

Mr. ROSE: I do not ask him to construe it at all, but simply ask for the fact, how many counties there were.

Mr. ERWIN: Having put a previous question which was a leading question, and got that on the witness's mind, he puts another question which is practically the same.

251 The COMMISSIONER: He withdrew the other question and now he is asking for the fact.

Mr. ROSE: I don't want to be criticized unjustly and unfairly, and I won't stand it.

Mr. ERWIN: I do say that your question as it reads ought to read after the leading question you put, whether it was a jury-box composed of all the other counties in the district, and not counties—whether there was a jury-box provided in which jurors from counties other than Chatham and Glynn were in the box. You have got your question so framed as to mislead in that. I will let it stand, however.

Mr. ROSE: All. That is more than the indictment will do.

Mr. ERWIN: We will see about that later.

Mr. ROSE: I think we agreed when we had this question up when your brother was on the stand, and I offered in evidence Exhibit "H 5" for identification, being the compilation of the rules of the court with respect to the drawing of jurors, that all that part on page 25 under the heading of No. 80, down to the bottom of the last completed sentence on page 26 should be received subject to verification by you as to its being the rules of the court. The next thing that appears is this order of January 26th 1897.

Mr. ERWIN: I don't remember precisely what the agree-
252 ment is. Whatever agreement we did enter into will stand. I object to that order as a rule of court because it was not a rule of court, but a specific order to do a specific thing. I do not object to the certified copy of it.

Mr. ROSE: Well, it lasted until another took its place, and that was done in November 1899.

Mr. ERWIN: My contention was, when the jury-box was revised and the list completed, that the order was completely complied with under the act, and that jurors could be drawn from that list so prepared right straight along under the law until there was a new revision made.

Mr. ROSE: And when they got it down to 25 they could draw 30 jurors out of it?

Mr. ERWIN: No sir; they could not do an impossible thing.

Q. Mr. Gillespie, I show you Exhibit "H 5" for identification, which purports to be the rules of practice of the circuit and district courts of the United States for the southern district of Georgia, and ask you if what appears on page 25 under the numerals 80, relating to juries, down to and including this sentence, "The marshal shall summon jurors by delivering to each person personally or by leaving at his usual residence a written or printed notice," if that is the rule of the court in relation to the matters there stated?

A. Yes sir.

253 Q. Then under the head of 81, 82, 83 and 84, are they also rules of the court with relation to jurors?

Mr. ERWIN: I object to this method of proving the rules of the court, as rules of court are always to be proved by certified copies of the orders making the rules from the records of the court.

Mr. ROSE: There are lots of rules that are never entered in an order. There are rules of lots of things to govern the practice of the court.

Mr. ERWIN: That would be proved as matter of law.

The COMMISSIONER: Do you want him to compare those with the rules of the court?

Mr. ERWIN: My objection is that a great many of these rules were enacted in 1880, and an inspection will show that acts of Congress have repealed a great many of them, and they still stand in that book.

Mr. ROSE: Do you mean to say with reference to this question of juries?

Mr. ERWIN: The way to prove them would be to show the copies of the orders that the court made adopting particular rules, and at the dates they were adopted. The dates form a material part of any rule of court. This is merely a compilation made by a deputy clerk, not by this deputy clerk, but by a deputy clerk of the circuit court living in a different place, and these may or may not be correct rules.

254 The COMMISSIONER: You may let him put in a certified copy of the rules on file in the office, if that is your point.

Mr. ERWIN: He has got to put certified copies of the orders of court. The rules are on the minutes of the court.

The COMMISSIONER: The rules of the court are spread, I suppose, on the minutes of the court.

Mr. ROSE: Do you go back on your agreement?

Mr. ERWIN: No, sir; my agreement stands.

Mr. ROSE: Your agreement was that they should be received subject to correction by you.

Mr. ERWIN: Whatever my agreement is, it stands.

Mr. ROSE: Then don't object to it when I try to verify it by the witness.

Mr. ERWIN: I do object to your undertaking to prove in this way the rules. Whatever I agreed to, stands, and if I agreed to anything there it stands, because I was careful in making the agreement, but when you undertake to try to prove rules of court by oral testimony of a deputy clerk 700 miles away from home, not having the originals before him, and not even with a paper which he prepared himself with the original, and the dates of the rules purporting to be shown not being set out, I say it is a wrong way to get at it.

The COMMISSIONER: If that is your objection I sustain it.

255 Mr. ROSE: When he is asked to produce the original papers, the judge and yourself refused to allow him to produce them.

Mr. ERWIN: But not certified copies.

Mr. ROSE: Now you object to this because he cannot have the original here and compare it; right here.

Mr. ERWIN: Do you want to bring the original minutes of the court here?

Mr. ROSE: You say I must put those in evidence.

Mr. ERWIN: I said certified copies.

Mr. ROSE: I beg your pardon. I can hear. You said he didn't have the originals here to compare them. I want to understand whether I am to put this testimony in or not.

Mr. ERWIN: I say you cannot prove it in this way.

Mr. ROSE: You can make your objections, but you cannot say whether I can or not. That is for the court.

The COMMISSIONER: I sustain the objection. A certified copy should be put in its place.

Mr. ROSE: I take an exception to that.

The COMMISSIONER: This man ought to have a chance to compare that book with the original on file.

Q. Are you familiar with this book, Exhibit "H 5" for
256 identification, the rules of practice of the circuit and district courts of the United States?

A. Yes sir.

Q. How long has that been used, if at all, in the district court?

Mr. ERWIN: I object to that on the ground that the question of use is immaterial. It might be a matter of who used it; for what purpose it was used, whether used merely as a matter of reference, or as authoritative rules in the form there presented. He is pre-

senting the compilation of rules that he has not even attempted to show, and the fact is, never was adopted in that form by the court, and which rules in many respects have long been abrogated, and in some respects are not correct.

The COMMISSIONER: Do you mean abrogated by an order of the court?

Mr. ERWIN: The first question to be asked is, Has he compared them with the rules.

(By the COMMISSIONER:)

Q. Have you compared these with the printed rules?

A. No sir.

(By Mr. ROSE:)

Q. Didn't you compare that with me?

A. This 80th one I did, but I have not compared them all.

Q. Did you compare with me that 80th rule with the records of your office?

A. Yes sir.

Q. Is it a correct copy?

A. Yes sir.

Q. That does not include that part that is under the date of the order, January 22d 1897?

A. No sir.

Mr. ROSE: I offer that in evidence.

257 Mr. ERWIN: Which?

Mr. ROSE: No. 80.

Mr. ERWIN: I want to ask him one question about it.

Mr. ROSE: When I get it in you can.

Mr. ERWIN: I desire to ask him one question before it is admitted in evidence.

(By Mr. ERWIN:)

Q. Is all this rule 80 above the date, January 22d 1897?

A. No sir.

Q. Do you mean to say that all that rule of court is of date, January 26th 1897?

A. No sir; that commences here (indicating).

Mr. ROSE: I expressly excluded that part of it. I am not given to trying to deceive the court or cheat. I have excluded that part of the rule which we have already in evidence as an order of January 26th 1897. That is in evidence.

Mr. ERWIN: If I did not ask — this question, the remaining part of it above that date might be though- to be on the same date.

The WITNESS: That is one of the old rules in the old book.

Q. This rule 80 is taken from a compilation of rules existent as far back as 1880, was it not?

A. Yes sir.

Mr. ROSE: 1873 if you want to go back to that.

Mr. ERWIN: Well.

258 Mr. ROSE: And if he will go away back further, I can get the report of the committee that reported the original rules.

Mr. ERWIN: It is sufficient to show it is a copy of a rule made back in 1873, according to the admission of counsel.

Mr. ROSE: It states on the outside, may it please your honor, adopted April term 1873, with all amendments to October term 1897.

Mr. ERWIN: The jury act was revised in 1879.

Mr. ROSE: The jury act as revised shows that you have an illegal grand jury.

The COMMISSIONER: You mean about there being 300 in the wheel?

Mr. ROSE: Yes.

The COMMISSIONER: I am familiar with that.

Mr. ROSE: Of course you are, and you never drew one like this.

Mr. ERWIN: Did you put in that past panel from the drawing of 1899?

Mr. ROSE: I did not.

Mr. ERWIN: You questioned Mr. Gillespie about it.

Mr. ROSE: I asked him who was the foreman of the grand jury that met in 1899; this alleged grand jury, and I showed him this paper.

259 Cross-examination by Mr. ERWIN:

Q. Mr. Gillespie, you stated in answer to one of Mr. Rose's questions that you were in charge of the records of the clerk's office in Savannah. You mean that you are in charge of the records under the clerk, do you not?

A. Certainly.

Q. Mr. King, the clerk, makes Savannah his headquarters?

A. Yes sir.

Q. And he is in the supreme charge of the records as clerk?

A. Yes sir.

Q. When the jurors are drawn from the box, their names—say for the grand jury—their names are entered first on a sheet of paper, the names and counties and address?

A. Yes sir.

Mr. ROSE: What jurors are you referring to now and when?

Mr. ERWIN: The grand jurors for the eastern division of the southern district at the times you have questioned him about.

Q. The names are entered on a sheet of paper, the name of each juror, the county and his address?

A. Yes sir.

Q. And that list is signed by the judge and usually by some of the officers of the court present, is it not? The drawing?

A. Yes sir.

Q. Then the judge issues an order directing the clerk to
260 issue a writ of *venire facias* for the summonsing of those jurors?

A. Yes sir.

Q. And then the clerk issues the writ?
A. Yes sir.
Q. Then the marshal, after making summons, makes a return of the persons served?
A. Yes sir.
Q. Now the list on which the names of the jurors are first entered when drawn from the box, are they not also entered on the minutes of the court from that list?
A. From the venire.
Q. From the sheet; not from the venire, because the venire is not yet issued. It is entered before issuing the venire on the minutes of the court from that sheet on which they are entered, as the names are taken from the box?
A. Yes sir.
Q. Now look at these papers showing the drawing of the grand jury for the eastern division for the November term of 1899?

Mr. ROSE: Is that in evidence, Mr. Erwin?
Mr. ERWIN: We haven't put it in evidence.
Mr. ROSE: Is it the same venire?
Mr. ERWIN: It is the same venire you had.

Q. That is a correct copy, Mr. Gillespie?
A. I presume so. I had rather compare it with my own copies though. I believe it is correct.
Q. Well, you need not compare it if you do not care to do it?
A. I am willing to do it, but I cannot swear that this is a copy.
261 Q. This is a properly certified copy?
A. Oh, yes, sir; certified by the clerk. Staten B. Tomlinson's name is spelled wrong there. Statin it should be.

Mr. ERWIN: You can put it right.
Mr. ROSE: No; I object to his putting it right.
Mr. ERWIN: Very well. Let it stand.
The WITNESS: They are the same except that one.

Q. They compare all the same, don't they?
A. Yes sir.

Mr. ERWIN: I desire to have this marked in evidence and offer it in evidence. It is the same as yours except the marshal's return is added.
Marked Exhibit 335, S. H., November 8th, 1900.
Mr. ROSE: I object to it as simply irrelevant and immaterial.

262 Ex. 335. Nov. 8, 1900.

In the District Court of the United States for Eastern Division, Southern District of Georgia, November Term, 1899.

In re THE GRAND JURY.

Names of Persons Drawn in Open Court to Serve as Grand Jurors in said District Court at the November Term, 1899.

1. Joseph B. Underwood	Quitman	Brooks	county
2. B. F. Strickland	Valdosta	Lowndes	"
3. Statin B. Tomlinson	Stockton	Clinch	"
4. Thomas J. Beasley	Quitman	Brooks	"
5. A. A. Parrish	Valdosta		
6. Harris A. Tomlinson	Stockton	Clinch	"
7. J. B. Varn	Valdosta	Lowndes	"
8. S. L. Youmans	Blackshear	Pierce	"
9. L. H. Jerger	Thomasville	Thomas	"
10. Charles N. Exley	Exley	Effingham	"
11. F. A. Thomas	Iron City	Decatur	"
12. W. T. Chapman	Whigham	Decatur	"
13. D. P. Averett	Statesboro	Bulloch	"
14. Henry Turner	Quitman	Brooks	"
15. M. B. Jones	Thomasville	Thomas	"
16. W. H. Huxford	Homerville	Clinch	"
17. Thos. S. McKey	Valdosta	Lowndes	"
18. Wm. S. Delk	Johnson Sta.	Liberty	"
19. W. B. Hambleton	Thomasville	Thomas	"
20. M. M. Futch	"	"	"
21. Wm. Miller	"	"	"
22. W. H. De Loach	Statesboro	Bulloch	"
23. David A. Beasley	Quitman	Brooks	"
24. P. S. Heeth	Thomasville	Thomas	"

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25. R. L. Hicks	Thomasville	Thomas	county.
26. James M. Reynolds	Blackshear	Pierce	"
27. John D. Bozeman	Quitman	Brooks	"
28. Reuben Brunson	Donaldsonville	Decatur	"
29. S. J. Barrineau	Faceville	"	"
30. W. R. Bell	Brinson	"	"
31. A. R. Benton	Donaldsonville	"	"
32. G. B. Alday	"	"	"
33. D. W. Kelly	Cairo	"	"
34. J. T. Saunders	Fairchild	"	"
35. W. A. Hagins	Mill Ray	Bulloch	"

EMORY SPEER,
U. S. Judge.

Drawn by judge in the presence of
L. M. ERWIN,
Deputy Clerk.
JOHN M. BARNES,
U. S. Marshal.
MARION ERWIN,
U. S. Attorney.

This 22nd day of November, 1899.

In re SAME.

Order for Venire.

It is ordered by the court that the clerk issue a writ of *venire facias*, directing the marshal of the United States to summon the persons whose names were drawn in open court this 22nd day of November, 1899, on the panel hereto annexed to be and appear personally at the United States court-room in the city of Savannah, Georgia, on the fourth day of December, A. D. 1899, at 9 o'clock in the forenoon of said day, then and there to be empaneled and sworn as grand jurors to serve in a district court of the United
264 States for said division, then and there to be holden.

In open court, Nov. 22nd, 1899.

EMORY SPEER,
U. S. Judge.

UNITED STATES OF AMERICA,
Eastern Division of the Southern District of Georgia.

The President of the United States to the marshal of the United States for the southern district of Georgia, Greeting:

You are hereby commanded to summon the several persons named in the panel hereto annexed, personally to be and appear at a district court of the United States for the eastern division of the southern district of Georgia, to be holden in the United States court-room in the city of Savannah, Georgia, in and for said division and district, on the first Monday (being the 4th day) in December, A. D. 1899 at 10 o'clock in the forenoon of that day, then and there to be empaneled and sworn as grand jurors, to serve at the November term 1899 of said district court.

And have you then and there this writ, with your proceedings endorsed thereon.

Witness the Honorable Emory Speer, judge of the district court of the United States, at Savannah, in said division and district, this 22nd day of November, A. D. 1899.

[Seal of U. S. District Court, Southern District of Georgia.]

L. M. ERWIN,
Deputy Clerk.

265 District Court United States, Southern District of Georgia, Eastern Division, November Term, 1899, at Savannah, Ga.

The return of John M. Barnes, U. S. marshal, to grand jury venire, drawn Nov. 22, 1899, for the November term of U. S. district court for the eastern division, served as follows:

	Personally on.	*At Residence on.*	*Not Found.*
1. Joseph B. Underwood			
2. B. F. Strickland			
3. Statin B. Tomlinson			
4. Thomas J. Beasley			
5. A. A. Parrish			
6. Harris A. Tomlinson			
7. J. B. Varn			
8. S. L. Youmans			
9. L. H. Jerger			
10.	.....	.....	Chas. N. Exley
11. F. A. Thomas			
12. W. T. Chapman			
13. D. P. Averett			
14. Henry Turner			
15. M. B. Jones			
16	.....	.....	W. H. Huxford
17. Thos. S. McKey			
18. Wm. S. Delk			
19. W. B. Hamilton			
20. M. M. Futch			
21. William Miller			
22. W. H. De Loach			

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23. David A. Beasley			
24. P. S. Heeth			
25. R. L. Hicks			
26	.....	.....	James M. Reynolds
27. Jno. D. Bozeman			
28. Reuben Brunson			
29. S. J. Barrineau			
30. W. R. Bell			
31. A. R. Benton			
32. G. B. Alday			
33.	.....	.....	D. W. Kelly
34.	.....	.....	J. T. Saunders
35. W. A. Hagins			

JOHN M. BARNES,
U. S. Marshal.

Dated at Savannah, Ga. this December 4, 1899.

Returned by marshal and filed this 4th day of December, 1899.

L. M ERWIN,
Deputy Clerk.

267 UNITED STATES OF AMERICA, *Southern District of Georgia,* } ss:

I, H. H. King, clerk of the district court of the United States for the southern district of Georgia, do hereby certify that the foregoing typewritten pages numbered from one to five inclusive, contain a true and complete copy of the list of names of persons drawn in open court to serve as grand jurors in the district court of the United States for the eastern division of the southern district of Georgia at the November term, 1899; and of order issued November 22, 1899, directing clerk to issue *venire facias;* and of *venire facias* issued on November 22, 1899, and of the return of John M. Barnes, U. S. marshal, to *venire facias,* filed December 4th, 1899, as the same appear of record and of file in my office.

Witness my official signature and the seal of said district court, this thirteenth day of January, in the year of our Lord one thousand and nine hundred.

[SEAL.]

H. H. KING, *Clerk,*
By L. M. ERWIN,
Deputy Clerk.

268 Q. Now Mr. Gillespie, look at these papers certified by Mr. King, the clerk, purporting to be extracts from the minutes of the district court of the United States, eastern division of the southern district of Georgia, Book 8, folios 74 to 82, in the matter of the grand jury and return of indictments December 4th, 5th, 6th, 7th, 8th 1899. Did you prepare that list for the clerk?

A. Yes sir.

Q. Now the first entry on these papers is the copy on the
269 minutes of the court of the list of jurors drawn, is it not?

A. Yes sir.

Q. There is one difference that I note. I notice on this certified copy of the names as drawn, taken from the minutes of the court, that there is one difference in the spelling of a name here from what it is on the copy of the venire which you have made here for Mr. Rose, as well as one made for me, and that is Reuben Brinson or Reuben Brunson. It appears on the copy from the venire that the name is entered Reuben Brunson, Donellsville, Decatur county, and on the copy of the minutes, being the copy of the identical same venire, it has got it Reuben Brinson, Donellsville, Decatur county. That ought to be the same if they both purport to be copies of the same paper?

A. They should be the same. That is the man's name.

Mr. ERWIN: I offer this certified copy from the minutes of the court in evidence.

Mr. ROSE: It is objected to as irrelevant and immaterial; that a certified copy is not the best evidence, but taken in connection with the testimony of the witness who testifies that he made this himself and knows it to be true, that objection is not insisted upon so far as its being a certified copy.

(By Mr. ROSE:)

Q. I understand you made that yourself, Mr. Gillespie?
A. Yes sir.

Paper marked Exhibit 336, S. H. November 8th 1900.

270 UNITED STATES OF AMERICA, } ss:
Eastern Division, Southern District of Georgia, }

I, H. H. King, clerk of the district court of the United States of America, for the southern district of Georgia, do hereby certify, that the writings annexed to this certificate are true copies of their respective originals now on file, and remaining on record in my office, to wit: extracts from the minutes of the district court of the United States, eastern division, southern district of Georgia, from Book "H," folios 74 to 82, in the matter of the grand jury and return of indictments, Dec. 4, 5, 6, 7, 8, 1899.

In witness whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Savannah, in the southern district of Georgia, this thirteenth day of January, in the year of our Lord, one thousand nine hundred (1900), and of the Independence of the United States, the one hundred and twenty-fourth.

[SEAL.] H. H. KING, *Clerk.*

271 District Court of the United States, Eastern Division, Southern District of Georgia, November Term, 1899.

Extract from Minute Book "H," Folios 72 to 82.

MONDAY, *December 4th*, 1899—10 o'clock a. m.

Court met and was opened for business by the Honorable Emory Speer, judge, presiding:—Marion Erwin, U. S. attorney, John M. Barnes, U. S. marshal and S. F. B. Gillespie, deputy clerk in attendance.

In re THE GRAND JURY.

Names of Jurors Drawn in Open Court to Serve as Grand Jurors in said District Court at the November Term, 1899.

1. Joseph B. Underwood	Quitman	Brooks county.
2. B. F. Strickland	Valdosta,	Lowndes "
3. Staten B. Tomlinson	Stockton,	Clinch "
4. Thomas J. Beasley	Quitman,	Brooks "
5. A. A. Parrish	Valdosta,	Lowndes "
6. Harris A. Tomlinson	Stockton,	Clinch "
7. J. B. Varn	Valdosta,	Lowndes county
8. S. L. Youmans	Blackshear,	Pierce county.
9. L. H. Jerger	Thomasville,	Thomas "
10. Charles N. Exley	Exley	Effingham county
11. F. A. Thomas,	Iron City,	Decatur "

12.	W. T. Chapman	Wigham,	Decatur county.
13.	D. P. Averitt	Statesboro,	Bulloch "
14.	Henry Turner	Quitman	Brooks "
15.	M. B. Jones	Thomasville,	Thomas "
16.	W. A. Huxford	Homerville,	Clinch county
17.	Thomas S. McKey	Valdosta,	Lowndes county

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18.	William S. Delk.	Johnson Sta.	Liberty county
19.	W. B. Hambleton	Thomasville,	Thomas "
20.	M. M. Futch	"	" "
21.	William Miller	"	" "
22.	W. H. De Loach	Statesboro,	Bulloch "
23.	David A. Beasley	Quitman,	Brooks, "
24.	P. S. Heeth	Thomasville,	Thomas "
25.	R. L. Hicks	"	" "
26.	James S. Reynolds	Blackshear,	Pierce "
27.	John D. Bozeman	Quitman,	Brooks "
28.	Reuben Brinson	Donaldsonville,	Decatur "
29.	S. J. Barrineau	Faceville,	" "
30.	W. R. Bell	Brinson,	" "
31.	A. R. Benton	Donaldsonville,	" "
32.	G. B. Alday	"	" "
33.	D. W. Kelly	Cairo,	" "
34.	J. T. Saunders	Fairchilds,	" "
35.	W. A. Hagins	Mill Ray,	Bulloch "

EMORY SPEER,
U. S. Judge.

Drawn by judge in presence of
L. M. ERWIN,
Deputy Clerk.
JOHN M. BARNES,
U. S. Marshal.
MARION ERWIN,
U. S. Attorney.

This 22nd day of November, 1899.

In re THE GRAND JURY.

Order for Venire.

It is ordered by the court that the clerk issue a writ of *venire facias* directing the marshal of the United States to summon the persons whose names were drawn in open court this 22nd day of November, 1899, on the panel hereto annexed to be and appear per-
273 sonally at the United States court-room in the city of Savannah, Georgia, on the fourth day of December, A. D. 1899, at 10 o'clock in the forenoon of said day then and there to be empaneled and sworn as grand jurors in a district court of the United States for said division then and there to be holden.

In open court, November 22nd, 1899.

In re THE GRAND JURY.

Return of Venire.

The marshal having returned the writ of venire into court with his return endorsed thereon, and the roll being called the following grand jurors answered to their names:

1. Joseph B. Underwood
2. B. F. Strickland.
3. Staten B. Tomlinson.
4. Thomas J. Beasley.
5. A. A. Parrish.
6. Harris A. Tomlinson.
7. J. B. Varn.
8. S. L. Youmans.
9. L. H. Jerger.
10. F. A. Thomas.
11. W. T. Chapman.
12. D. P. Averitt.
13. Henry Turner
14. M. B. Jones
15. Thomas S. McKey
16. W. B. Hambleton
17. William Miller.
18. David A. Beasley.
19. R. L. Hicks.
20. Jno. D. Bozeman.
21. Reuben Brinson
22. S. J. Barrineau
23. W. R. Bell.

P. S. Heeth, A. R. Benton, G. B. Alday and W. S. Delk reported and were excused for the term.

274 In the Matter of THE GRAND JURY.

Names of Grand Jury Empaneled and Sworn.

1. Joseph B. Underwood.
2. Benjamin F. Strickland.
3. Staten B. Tomlinson.
4. Thomas J. Beasley.
5. Ansel A. Parrish.
6. John B. Varn.
7. Harris A. Tomlinson.
8. Stephen L. Youmans.
9. Louis A. Jerger.
10. Frank A. Thomas.
11. William T. Chapman.
12. David P. Averitt.
13. Henry Turner.
14. Mitchell B. Jones.
15. Thomas S. McKey.
16. William B. Hambleton.
17. William Miller.
18. Richard L. Hicks.
19. David A. Beasley.
20. John D. Bozeman.
21. Reuben Brinson.
22. Samuel J. Barrineau.
23. Wiley R. Bell.

The charge of the court having been delivered to the grand jury, the grand jurors of whom mention has been made, twenty-three in number, retired to their room to make up their presentments.

Court adjourned to 10 o'clock a. m. tomorrow.

TUESDAY, *Dec. 5th*, 1899—10 o'clock a. m.

Court met and was opened for business by the Honorable Emory Speer, judge presiding:—Marion Erwin, U. S. attorney, John M. Barnes, U. S. marshal, and S. F. B. Gillespie, deputy clerk in attendance.

In re THE GRAND JURY.

Regular Panel in Attendance.

275

1. Joseph B. Underwood.
2. Benjamin F. Strickland.
3. Staten B. Tomlinson.
4. Thomas J. Beasley.
5. Ansel A. Parrish.
6. Harris A. Tomlinson.
7. John B. Varn.
8. Stephen L. Youmans.
9. Louis A. Jerger
10. Frank A. Thomas.
11. William T. Chapman.
12. David P. Averitt.
13. Henry Turner.
14. Mitchell B. Jones
15. Thomas S. McKey
16. William B. Hambleton.
17. William Miller.
18. David A. Beasley.
19. Richard L. Hicks
20. John D. Bozeman
21. Reuben Brinson
22. Samuel J. Barrineau
23. Wiley R. Bell

Court adjourned to 10 o'clock a. m. tomorrow.

WEDNESDAY, *December 6th*, 1899—10 o'clock a. m.

Court met and was opened for business by the Honorable Emory Speer, judge presiding:—Marion Erwin, U. S. attorney, John M. Barnes, U. S. marshal and S. F. B. Gillespie, deputy clerk, in attendance.

In re THE GRAND JURY.

Regular Panel in Attendance.

1. Joseph B. Underwood.
2. Benjamin F. Strickland.
3. Staten B. Tomlinson.
4. Thomas J. Beasley.
5. Ansel A. Parrish.
6. Harris A. Tomlinson.
7. John B. Varn
8. Stephen L. Youmans.
9. Louis A. Jerger.
10. Frank A. Thomas.
11. William T. Chapman
12. David P. Averitt
13. Henry Turner
14. Mitchell B. Jones
15. Thomas S. McKey.
16. William B. Hambleton.
17. William Miller
18. David A. Beasley
19. Richard L. Hicks.
20. John D. Bozeman.
21. Reuben Brunson
22. Samuel J. Barrineau.
23. Wiley R. Bell.

Court adjourned to 10 o'clock a. m. tomorrow.

276 THURSDAY, *December 7th*, 1899—10 o'clock a. m.

Court met and was opened for business by the Honorable Emory Speer, judge presiding:—Marion Erwin, U. S. attorney, John M. Barnes, U. S. marshal and S. F. B. Gillespie in attendance.

In re THE GRAND JURY.

Regular Panel in Attendance.

1. Joseph B. Underwood.
2. Benjamin F. Strickland.
3. Staten B. Tomlinson.
4. Thomas J. Beasley.
5. Harris A. Tomlinson.
6. Ansel A. Parrish.
7. John B. Varn.
8. Stephen L. Youmans.
9. Louis A. Jerger.
10. Frank A. Thomas.
11. William T. Chapman.
12. David P. Averett.
13. Henry Turner.
14. Mitchell B. Jones.
15. Thomas S. McKey.
16. William B. Hambleton.
17. William Miller.
18. David A. Beasley.
19. Richard L. Hicks.
20. John D. Bozeman
21. Reuben Brunson
22. Samuel J. Berrineau
23. Wiley R. Bell

Court adjourned to 10 o'clock a. m. tomorrow.

FRIDAY, *December* 8, 1899—10 o'clock a. m.

Court met and was opened for business by the Honorable Emory Speer, judge presiding:—Marion Erwin, U. S. attorney, John M. Barnes, U. S. marshal and S. F. B. Gillespie, deputy clerk in attendance.

In re THE GRAND JURY.

Regular Panel in Attendance.

277

1. Joseph B. Underwood
2. Benjamin F. Strickland.
3. Staten B. Tomlinson.
4. Thomas J. Beasley.
5. Ansel A. Parrish
6. John B. Varn
7. Stephen L. Youmans.
8. Louis H. Jerger
9. Frank A. Thomas
10. William T. Chapman
11. David P. Averett
12. Harris A. Tomlinson
13. Henry Turner.
14. Mitchell B. Jones
15. Thomas S. McKey
16. William B. Hambleton
17. William Miller
18. David A. Beasley
19. Richard L. Hicks
20. John D. Bozeman
21. Reuben Brunson
22. Samuel J. Barrineau
23. Wiley R. Bell

The grand jury having come into court and the roll being called, the following-named grand jurors answered to their names:

1. Thomas S. McKey, foreman.
2. Joseph B. Underwood.
3. Benjamin F. Strickland
4. Staten B. Tomlinson
5. Thomas J. Beasley
6. Ansel A. Parrish
7. John B. Varn
8. Stephen L. Youmans.
13. Harris A. Tomlinson.
14. Henry Turner.
15. Mitchell B. Jones.
16. William B. Hambleton
17. William Miller
18. David A. Beasley.
19. Richard L. Hicks.
20. John D. Bozeman.

9. Louis H. Jerger
10. Frank A. Thomas
11. William T. Chapman.
12. David P. Averett
21. Reuben Brunson.
22. Samuel J. Barrineau.
23. Wiley R. Bell.

278 Whereupon the grand jurors whose names are mentioned above, twenty-three in number, returned into court the following true bills of indictment:

THE UNITED STATES *versus* BENJAMIN D. GREENE, JOHN F. GAYNOR, William T. Gaynor, Edward H. Gaynor, Michael A. Connally, Oberlin M. Carter.	Indictment No. 322. Violation Sections 5440 and 5438, R. S. Filed December 8th, 1899. A True Bill. Thomas S. McKey, Foreman.

Court adjourned to 10 o'clock tomorrow.

279 In the District Court of the United States for the Eastern Division of the Southern District of Georgia.

UNITED STATES *vs.* BENJAMIN D. GREENE ET AL.	Indictment. Conspiracy to Defraud. Filed December 8, 1899.

The defendants Benjamin D. Greene, Edward H. Gaynor, John F. Gaynor, William T. Gaynor and Michael A. Connolly in the above-stated case being called, the United States attorney presents the following-described documents:

Notice from the said United States attorney under date of March 5, 1900, to Abram J. Rose, Esq., attorney for said Benjamin D. Greene, Edward H. Gaynor, John F. Gaynor and William T. Gaynor, returned served March 8, 1900, that said case would be called in this court on this the 12th day of March, 1900.

The answer of the said Abram J. Rose, under date of March 8, 1900, to said notice, and a copy of the answer of the said United States attorney to the said Abram J. Rose under date of March 12, 1900.

Also notice from said United States attorney to M. A. Connolly, Esq., under date of March 10, 1900, that said case would be called on this 12th day of March, and return of service thereon of March 10, 1900.

And the said Benjamin D. Greene, Edward H. Gaynor, John F. Gaynor, and William T. Gaynor not appearing, and the said Michael A. Connolly appearing:

It is ordered by the court that the aforesaid documents
280 hereto attached be filed with the clerk of this court.

In open court, March 12, 1900.

EMORY SPEER,
United States Judge.

Office of the United States attorney, southern district of Georgia.

MACON, GA., *March* 5, 1900.

Abram J. Rose, Esq., attorney, New York city.

You are hereby notified as attorney for Benjamin D. Greene, Edward H. Gaynor, John F. Gaynor, and William T. Gaynor in the case of United States *vs.* Benjamin D. Greene and others, charged with conspiracy to defraud, in which case the parties above named represented by you are defendants, that the above-stated case will be called in the United States district court at Savannah, Georgia, on Monday March 12, 1900, at 10 o'clock a. m. in order that the defendants to the indictment in said case may appear in person, and interpose any objections which they may desire to urge as to the empaneling of the grand jury that returned the true bill of indictment in said case, and such other objections as they may make to the validity of said indictment.

Very respectfully, MARION ERWIN,
U. S. Attorney.

I hereby certify that on the 8th day of March, 1900, at the city of New York, in my district, I personally served the within subpœna (notice) upon the within-named Abram J. Rose by exhibiting to him the within original, and at the same time leaving with him
281 a copy thereof.

WILLIAM HENKEL,
United States Marshal, Southern District of New York.

Dated March 8, 1900. (J. B. B.)

L. Laflin Kellogg, Abram J. Rose, Arthur H. Smith, Alfred C. Pette, Philip M. Brett.

Law offices of Kellogg, Rose & Smith, Equitable building, 120 Broadway.

NEW YORK, *March 8th*, 1900.

Hon. Marion Erwin, U. S. attorney, Macon, Ga.

SIR: On March 8th, 1900, at ten a. m. I was served by the U. S. marshal of the southern district of New York, with a letter purporting to be signed by you, of which the following is a copy:

"Abram J. Rose, Esq., attorney, New York city.

You are hereby notified as attorney for Benjamin D. Green, Edward H. Gaynor, John F. Gaynor and William T. Gaynor in the case of United States *vs.* Benjamin D. Green and others, charged with conspiracy to defraud in which case the parties above named represented by you are defendants, that the above-stated case will be called in the United States district court at Savannah, Georgia, on Monday —— 12, 1900, at 10 o'clock a. m. in order that the defendants to the indictment in said case may appear in person and interpose any objections which they may desire to urge as to the

empaneling of the grand jury that returned the true bill of indictment in said case and *other* other objections as they may make to the validity of said indictment.

Very respectfully,

MARION ERWIN,
U. S. Attorney."

Hon. M. Erwin—2.

In reply thereto, permit me to call your attention to certain facts connected with the case mentioned in your letter.

282 On December 13th, 1899, the assistant U. S. attorney for the southern district of New York made a sworn complaint before U. S. Commissioner John Shields, in the case of United States *vs.* Benjamin D. Greene, John F. Gaynor, Edward H. Gaynor and William T. Gaynor, charging them with a conspiracy to defraud the United States. The complaint also states that an indictment had been found against these parties with others by a grand jury drawn in the eastern division of the southern district of Georgia, and there was annexed to the complaint what purported to be a copy of said alleged indictment. The complaint asked that the defendants above named be removed to the district above named for trial. This indictment is, I assume, the one referred to in your letter of March 5th, 1900.

On this complaint Commissioner Shields issued his warrant and the parties above named voluntarily appeared before him, demanded an examination and were held to bill, which they furnished. The commissioner, after several hearings, held these parties to await a warrant of removal by the district judge and they went before Hon. Addison Brown, United States district judge for the southern district of New York. They were taken in custody by the U. S. marshal; the judge fixed their bail and they gave bail for their appearance before him when required and to surrender themselves to the marshal if the judge should determine that a warrant of removal to Georgia should be granted.

The question raised and the application for such warrant have, as you know, been argued before Judge Brown and the matter is pending before him, his decision being expected at any time.

I have not stated here anything not within your own knowledge or for purposes of refreshing your recollection, but because it seems to me that your letter to me must have been written without

283 considering these facts.

The United States has instituted a proceeding in the southern district of New York, which is pending here and under which the parties must be personally present in that district day by day, and you, on behalf of the United States, in the same case ask or demand that these same parties appear at the same time; the suggestion being that if they fail to do so they will waive or lose some of their rights.

I cannot believe that you as a fair man would insist on this or that a fair court would hold this to be the law. Your client cannot ask impossibilities and the law does not require them.

I am not admitted to practice in the U. S. district court for the

southern district of Georgia and have not been retained by the parties named in your letter to appear there for them in the case you mention.

I have, therefore, sent a copy of this letter to the clerk of the United States district court for the southern district of Georgia, with the request that if you file your letter to me with the clerk or make it part of the record, that he will cause this letter to be filed and thus prevent any inference being drawn that your courteous letter went without attention.

As the time is so short, I send this letter to Savannah in care of the clerk, as I am fearful it might not reach you before Monday if sent to Macon.

Yours truly, ABRAM J. ROSE.

284 (Copy.)

Department of Justice, office of United States attorney, southern district of Georgia.

SAVANNAH, GEORGIA, *March* 12, 1900.

Abram J. Rose, Esq., of the firm of Kellogg, Rose & Smith, 120 Broadway, New York city.

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant in answer to notice under date of March 5th, 1900, from me as United States attorney, to you as attorney for Benjamin D. Greene and others, which notice was served upon you on the 8th instant and which notice informed the said Benjamin D. Greene, Edward H. Gaynor, John F. Gaynor and William T. Gaynor, charged on indictment in the United States district court for the eastern division of the southern district of Georgia with conspiracy to defraud, that the said case would be called in the United States district court in Savannah on Monday March 12th instant at 10 o'clock a. m. at which time they might be present in person and make such preliminary motions as might be appropriate.

I note that you cite the proceedings in New York in which the defendants mentioned in the indictment are under bond to appear before the Honorable Addison Brown, United States district judge there, on proceedings for removal on the indictment from Georgia, as a reason why the defendants cannot in person appear before the court here. I may be in error about it, but to my mind these proceedings furnish the strongest reasons why the defendants should be held in laches so far as the proceedings here are concerned. Neither can I concede that you as an attorney admitted to practice in the circuit and district courts of the United States for the southern district of New York and before the Supreme Court of the United States and who appeared for and are now representing the defendants in resist-
285 ing the proceedings taken against them under section 1014 of the Revised Statutes, before the commissioner and district judge in New York to force their appearance to answer the indictment before the United States court here, can limit your responsibility as attorney so far as notice to you is notice to defendants by

claiming that you have not yet been employed to represent the defendants in the district court in Georgia. Nothing prevents the defendants from giving bond before Judge Brown for appearance before the court here, or from surrendering themselves to the marshal and being brought here at Government expense, except the objections to the removal made by the defendants through you as their attorney. The withdrawal by you of these objections would have enabled the defendants to be here to meet the charges against them. It would seem therefore that the impossibility of having the defendants in two places at once to which you refer is only the difficulty of surmounting a barrier raised by the defendants themselves and one which they may remove at pleasure. The defendants, of course, have an election to exhaust every legal remedy in their reach to delay or postpone their appearance to answer the indictment before the United States district court in Georgia.

They can ignore the proceedings here until all legal remedies may be exhausted and until they may be finally brought here, if that should be the result. But with full notice of the proceedings here and opportunity given to appear and be heard, they take that course at the peril of being adjudged in laches, should their efforts to evade being brought before the court here prove abortive.

At the opening of the court today I will file my notice, this letter and your letter as requested by you.

Thanking you for your prompt reply to my notice, and for
286 your courteous attentions while in New York, I remain,

Very respectfully, MARION ERWIN,
United States Attorney.

Department of Justice, office of United States attorney, southern district of Georgia.

SAVANNAH, GEORGIA, *March* 10, 1900.

M. A. Connolly, Esq., Savannah, Georgia.

SIR: The case of The United States *vs.* Benjamin D. Greene and others charged on indictment with conspiracy to defraud, in the United States district court for the eastern division of the southern district of Georgia, in which case you are one of the defendants, will be sounded on Monday, March 12th, at 10 o'clock a. m. in the said court at Savannah, Georgia, at which time you may be present in person and make any preliminary motions you may think appropriate.

Respectfully, MARION ERWIN,
United States Attorney.

I certify that on March 10th, 1900, in the city of Savannah Ga., Chatham county, within my district, I personally served M. A. Connolly with a copy of the within paper, which he read in my presence.

JOHN M. BARNES,
U. S. Marshal.

287 (Endorsement:) United States district court, eastern division, southern district of Ga.—United States *vs.* Benjamin D. Greene, *et al.* Order directing the clerk to file certain documents presented by the U. S. attorney. Filed in office this 12th day of March, 1900. H. H. King, clerk.

288 (By Mr. ERWIN:)

Q. Mr. Gillespie, there was a session of the district court at the February term 1900, at Savannah, was there not?

A. Yes.

Q. Did you prepare these certified copies of certain proceedings had there in the case of The United States *v.* Benjamin D. Greene, *et al.*, in regard to certain proceedings taking place on the 12th day of March 1900, at the February term 1900 of the district court?

Mr. ROSE: This is objected to as long after this indictment was filed, after the time when the crime is charged to have been committed, after the irregularities and illegalities in relation to this jury had taken place, in the absence of and without notice to the defendants, and therefore cannot be binding upon them.

Mr. ERWIN: This is a preliminary question, Mr. Rose, and I propose to follow it.

Mr. ROSE: I know what it is, and I know it is a lie.

Objection overruled, exception taken.

A. I did prepare it.

Mr. ROSE: This is in March and the indictment was found in December preceding.

The COMMISSIONER: Yes.

Mr. ERWIN: Now I tender this certified copy of the proceedings had at the February term 1900 district court, eastern divis-
289 ion of the southern district of Georgia at Savannah.

The COMMISSIONER: What is the purport of them?

Mr. ERWIN: The report shows that notice was given by myself as United States district attorney for the southern district of Georgia to Messrs. Rose, Kellogg and Smith, service being perfected here in New York on Mr. Rose, as attorney for these defendants in this proceeding here, being a preliminary proceeding looking to the holding of the defendants to bail in the southern district of Georgia, of a session of the court in Savannah, and that their case would be called on March 12th 1900, and that they would then be given the opportunity in person to raise any of these matters in regard to the empaneling of the jury or irregularities, if they desired to make them, and Mr. Rose replied to my letter which he requested to be put on file of the court, and which was put on file, together with the whole correspondence and the order of the court thereon directing that it should be put on file, this being a certified copy of those proceedings.

Mr. ROSE: This is three months after the indictment was filed, when the proceeding was pending here. The district attorney

thought he would be smart and try to put us in, or get some
290 advantage because we did not appear there in Savannah. I had been retained to defend these gentlemen here in this court and not in Savannah; not on the trial of this indictment; not for any purpose other than to protect and to resist the removal proceedings. No notice was ever given to them according to these papers. A letter was served on me, as attorney for them, requiring the defendants to appear there and raise any motions of way of demurrer or motion to quash, to which Mr. Rose responded that I was not the attorney for these gentlemen in Savannah and never have been. Your notice is no good. Thereupon I sent that letter, and I stated if you used your letter to me, suspecting some scheme to foreclose my clients' rights, you used my answer. That is what I said about putting it on record; and thereupon the district attorney and the court together——

The COMMISSIONER: That is a polite invitation on the part of Mr. Erwin to get you down there.

Mr. ROSE: Yes sir. He seeks to bind a client in one proceeding by notice to me in another, and that they cannot do. Then in response to that I saw in the paper that the learned district attorney replied to my communication to him, my letter having been sent only a day or two, and his reply being dated March 12th and his notice being that I must be there on the 10th. That reply never
291 was received by me in any way, shape or fashion, and I doubt very much if it was ever sent.

Mr. ERWIN: It was sent, sir.

Mr. ROSE: I never have seen that reply, nor the substance of it, except that I saw in a paper that it was stated in the court that it was replied to.

The COMMISSIONER: Do you offer that in evidence?

Mr. ROSE: I would like to have your honor reserve your decision on it.

The COMMISSIONER: Decision reserved.

Paper marked for identification Exhibit 337. S. H., November 8th, 1900.

292 For iden. Ex. 337. S. H. Nov. 8th, 1900.

UNITED STATES OF AMERICA,
Eastern Division, Southern District of Georgia, } ss:

I, H. H. King, clerk of the district court of the United States of America for the southern district of Georgia, do hereby certify that the writing annexed to this certificate is a true copy of its respective original now on file, and remaining on record in my office, to wit: In the case of United States *vs.* Benjamin D. Greene, *et al.* Indictment for conspiracy. Order directing the clerk to file certain documents presented by the U. S. attorney.

In witness whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Savannah, in the southern district of Georgia, this 18th day of October, in the year of our Lord, one

thousand nine hundred and — and of the Independence of the United States, the one hundred and twenty-fifth.

293 [SEAL.] H. H. KING, *Clerk.*

Mr. ERWIN: The Supreme Court has held that they are estopped even without notice and when they have a knowledge of the pendency of an indictment. They had that knowledge immediately after that indictment in December 1899, as otherwise shown in this court; but so that they would have abundant opportunity I gave them notice when they could appear there and there would be a session of the court and every opportunity in the world, which went beyond the requirement of the statute, because the fact that the courts were to meet at stated times is fixed by law and they had that opportunity, but I went beyond that and gave them written notice through their counsel and his letter states in it that he recognized the

294 fact that the case here in New York was the same case as that pending in Savannah. The record speaks for itself, and so far as the insinuation that my answer was not received, why I take it as coming from the source it comes from, and if necessary I will prove by testimony other than mine that the letter was actually sent.

The COMMISSIONER: Anything further from this witness?

Mr. ERWIN: No sir.

Mr. ROSE: Now I would like to have this appear on the record whether I am correct in what I state. The district attorney has stated that a letter was sent to the office of Rose, Kellogg and Smith,—that was the wrong name, it being Kellogg, Rose and Smith,—of which he asks to introduce a certified copy. No such letter appears in this paper, the letter being addressed to Abram J. Rose. It was served upon me by the marshal. The firm of Kellogg, Rose and Smith are the attorneys in the proceedings here before you. To that letter I personally replied. He has stated that I recognized that this proceeding was a part of the proceeding there at the trial, which I did not do any such thing in my letter.

Mr. ERWIN: The letter speaks for itself.

Mr. ROSE: "The United States have instituted a proceeding in the southern district of New York *when* is pending here, and

295 under which the defendants must be personally present in the district court day by day, and you on behalf of the United States in the same case ask or demand that these same parties appear at the same time, the suggestion being that if they failed to do so, they will waive or lose some of their rights." Now this is spelled, "l-o-o-s-e" some of their rights. If this is a certified copy I did not write "l-o-o-s-e" anyhow. "I am not admitted to practice in the United States district court for the southern district of Georgia, and have not been retained by the parties named in your letter to appear for them in the case you mention. I therefore send a copy of this letter to the clerk of the United States district court for the southern district of Georgia with a request that if you file your letter to me with the clerk, or make it a part of the record, that he will cause this letter to be filed and thus present any inference being drawn

that your courteous letter went without attention." And yet, the learned district attorney in the face of that says that I asked to have this letter filed on the bare statement appearing and regardless of any statement on his part that he was to use his letter. I only asked to have it filed in case of a contingency arising that he put his letter on the record.

296 Mr. ERWIN: And I put mine on file, of course, as I intended to do, and it was your request that yours be put on file, and I did so.

Mr. ROSE: That was not your statement. You said I sent that letter back and asked you to have it filed.

Mr. ERWIN: So you did.

297 EXHIBIT "G." Referred to in the Annexed Petition.

The President of the United States of America to the marshal of the United States for the southern district of New York and to his deputies or any or either of them:

Whereas, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor have been arrested and imprisoned in this district by John A. Sheilds, an United States commissioner for the southern district of New York, for an offence alleged to have been committed in another district, that is to say, for having on the 1st day of January in the year one thousand eight hundred and ninety-seven at the southern district of Georgia, unlawfully, knowingly, and feloniously amongst themselves, and with divers other persons, unknown, conspired, confederated and agreed together to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor and others and which was then and there in process of execution by them. That said fraudulent scheme was first devised, concocted and put in operation in said southern district of Georgia, by and between the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor and others, on or about the year of our Lord one thousand eight hundred and ninety-one, and has been continuously in process of execution in said southern district of Georgia by and between said parties, as by reference to the original warrant of arrest and the commitment endorsed there-

298 upon which are hereto attached, will more fully and at large appear, and whereas the said southern district of Georgia is that in which trial of the said offense is to be had and the United States attorney of this district having applied to me for a warrant of removal under the provisions of section 1014 of the Revised Statutes of the United States.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to remove the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor forthwith to the southern district of Georgia and to safely deliver them to the marshal of the said district, or to such person as shall be by the said marshal deputized to receive them.

Given under my hand this 28th day of May in the year one thousand nine hundred and one.

ADDISON BROWN,
United States District Judge, Southern District of New York.

Attest: SAMUEL H. LYMAN, *Clerk.*

[SEAL.]

299 [Endorsed:] The United States of America *vs.* Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor. Warrant of removal. Henry L. Burnett, U. S. att'y.

Let the defendants be bailed in the sums specified in the order of May 23rd, 1901, May 28th, 1901.

ADDISON BROWN, *U. S. D. J.*

The defendants having given bail as required, they are hereby discharged from custody.

ADDISON BROWN, *U. S. D. J.*

MAY 28TH, 1901—1.25 p. m.

A true copy.
[SEAL.]

SAMUEL H. LYMAN, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I hereby certify that the within-named defendants were this day surrendered to me by their sureties before Judge Lacombe and that I now hold them in custody under the within warrant.
June 8, 1901.

WM. HENKEL,
U. S. Marshal.

300 (Endorsed:) United States circuit court, southern district of New York.—In the matter of the petition of Benjamin D. Greene, *et al.* against William Henkel United States marshal, etc.—Petition for writ of *habeas corpus.*—Kellogg & Rose, att'ys for petitioners, 120 Broadway, New York.—U. S. circuit court, Filed Jun- 8, 1901, John A. Shields, clerk.

301 At a stated term of the circuit court of the United States in and for the southern district of New York, held at the United States court and post-office building in the borough of Manhattan, of the city of New York, on the 8th day of June, 1901.
Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Petition of BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. GAYNOR for a Writ of *Habeas Corpus.*

On reading and filing the petition of Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, verified the 8th day of June 1901, for a writ of *habeas corpus* directed to William

Henkel, Esq., United States marshal in and for the southern district of New York requiring him to bring and have the petitioners before this court together with the true cause of their detention and restraint of the petitioners, to the end that this court may act thereupon as of right and according to law ought to be done, and it appearing from the said petition that the petitioners are not entitled to the said writ,

Now, after hearing Abram J. Rose, Esq., of counsel for said
302 petitioners in support of said application and due deliberation having been had, it is

Ordered that such application be and the same hereby is, in all things denied.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York.—In the matter of the petition of Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor for a writ of *habeas corpus*.—Order denying application for writ of *habeas corpus*. Kellogg & Rose, att'ys for petitioners, 120 Broadway, New York.—U. S. circuit court, Filed Jun- 8, 1901, John A. Shields, clerk.

303 Circuit Court of the United States for the Southern District of New York.

In the Matter of the Petition of BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. GAYNOR for a Writ of *Habeas Corpus*.

BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and Edward H. Gaynor, Appellants,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, Appellee.

SIRS: Please take notice that Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, the petitioners above named hereby appeal to the Supreme Court of the United States from the final order made and entered herein on the 8th day of June, 1901, denying their application for a writ of *habeas corpus* and from each and every part of the said order.

Dated at the city of New York on the 8th day of June, 1901.

Yours, etc.,
KELLOGG & ROSE,
Attorneys and Counsellors for Petitioners, 120 Broadway, Manhattan, New York City, New York.

To Hon. Henry L. Burnett, United States attorney in and for the southern district of New York.

304 To William Henkel, Esq., United States marshal for the southern district of New York.

To John A. Shields, Esq., clerk of the circuit court of the United States in and for the southern district of New York.

(Endorsed:) U. S. circuit court, southern dist. of New York.—In the matter of the petition of Benjamin D. Greene, *et al.*, etc., against William Henkel, United States marshal, etc.—Notice of appeal.—Kellogg & Rose, att'vs for appellants, 120 Broadway, New York.—Service of a copy of within notice of appeal is hereby admitted. Dated New York, June 8, 1901. Wm. Henkel, U. S. marshal.—Henry L. Burnett, U. S. att'y.—U. S. circuit court, Filed Jun 8, 1901, John A. Shields, clerk.

305 Circuit Court of the United States for the Southern District of New York.

In the Matter of the Petition of BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. GAYNOR for a Writ of *Habeas Corpus*.

BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and Edward H. Gaynor, Appellants,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, Appellee.

The petition of the above-named petitioners for an order allowing an appeal to the Supreme Court of the United States from the final order hereinbefore entered in this case.

Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, petitioners and appellants above named, each feeling himself aggrieved by the final order heretofore made and entered by this court in this case on the 8 day of June 1901, whereby it was ordered that their application for a writ of *habeas corpus*, directed to William Henkel, United States marshal in and for the southern district of New York, requiring the said marshal to
306 bring and have your petitioners before this court, together with the true cause of the detention of your petitioners, be, and the same thereby was denied, now comes, by Kellogg & Rose, their solicitors and counsel, and petitions this court for an order allowing them and each of them, said petitioners, to prosecute an appeal from said final order to the Supreme Court of the United States under and according to the laws of the United States in that behalf made. Your petitioners are advised by counsel that there are grave doubts as to whether the proceedings referred to in the petition have not infringed the constitutional rights of your petitioners and that the order of removal of the petitioners referred to in said petition is without authority of law and that the United States district court for the southern district of Georgia, to which court the said order of removal directs the said United States marshal to remove your petitioners for trial, is without jurisdiction to try your petitioners for the offenses set out in said proceedings, and your petitioners and each of them desire in good faith to submit

the constitutional questions and other questions involved to the Supreme Court for their determination.

Your petitioners will ever pray.

B. D. GREENE.
JOHN F. GAYNOR.
WM. T. GAYNOR.
EDWARD H. GAYNOR.

307 KELLOGG & ROSE,
Attorneys for Petitioners, 120 *Broadway,*
Manhattan, New York City, N. Y.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, being each severally and separately duly sworn, say they are the petitioners above named; that the foregoing petition is true to their own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters they believe it to be true.

B. D. GREENE.
JOHN F. GAYNOR.
WM. T. GAYNOR.
EDWARD H. GAYNOR.

Sworn to before me this 8 day of June 1901.
JOHN A. SHIELDS, *U. S. Com.*

The foregoing petition on appeal is granted and claim of appeal therein made is allowed. Supersedeas bond fixed at $250.

Done in open court this 8th day of June 1901.
E. HENRY LACOMBE,
United States Circuit Judge.

308 (Endorsed:) U. S. circuit court, southern dist. of New York.—In the matter of the petition of Benjamin D. Greene, *et al.* etc. against William Henkel, United States marshal, etc.—Petition of appeal.—Kellogg & Rose, att'ys for petitioners, 120 Broadway, New York. U. S. circuit court, Filed Jun- 8, 1901, John A. Shields, clerk.

309 In the Supreme Court of the United States.

In the Matter of the Petition of BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. GAYNOR for a Writ of *Habeas Corpus.*

Now comes the petitioners, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, by Kellogg & Rose, their counsel in connection with their petition of appeal to the Supreme Court from the final order of the circuit court of the United States, in and for the southern district of New York, entered herein

on the 8th day of June, 1901, denying a writ of *habeas corpus*, and make and file the following assignment of errors:

The court erred:

1. In denying the petitioners' application for a writ of *habeas corpus*.

2. In refusing to grant the said application.

3. In deciding that it appears from the petition itself that the relators were not entitled to such writ.

4. In holding that the alleged grand jury which presented and filed the alleged indictment, all as mentioned in the petition,
310 was a valid grand jury or that it was legally and properly drawn.

5. In holding that the said alleged indictment stated an offence against the laws of the United States.

6. In holding that the United States district court for the southern district of Georgia has jurisdiction to try the petitioners under the said alleged indictment.

7. In holding that the warrant of removal made by the United States district judge for the southern district of New York was issued upon a finding of probable cause.

8. In holding that the petitioners were in custody of the said William Henkel, United States marshal in and for the southern district of New York, and deprived of their liberty by him by due process of law.

9. In not holding the action of the said alleged grand jury on the 8th day of December 1899, in the eastern division of the southern district of Georgia was, so far as the petitioners were concerned, of no force and effect and that the alleged indictment filed by such alleged grand jury furnished no ground or basis upon which the petitioners could be tried or removed from the southern district of New York for trial.

By reason whereof, the petitioners pray that the said order denying said application for a writ of *habeas corpus* be reversed,
311 and that your petitioners be discharged from custody.

BENJAMIN D. GREENE,
JOHN F. GAYNOR,
WILLIAM T. GAYNOR,
EDWARD H. GAYNOR,
All by ABRAM J. ROSE,
Their Counsel.

KELLOGG & ROSE,
Counsel for Petitioners, 120 *Broadway, N. Y.*

(Endorsed:) In the Supreme Court of the United States.—In the matter of the petition of Benjamin D. Greene and others for a writ of *habeas corpus*.—Assignment of errors.—Kellogg & Rose, att'ys for petitioners, 120 Broadway, New York.—U.S. circuit court, Filed Jun 8, 1901, John A. Shields, clerk.

312 Supreme Court of the United States.

In the Matter of the Petition of BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. GAYNOR for a Writ of *Habeas Corpus*.

BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and Edward H. Gaynor, Appellants,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, Appellee.

Know all men by these presents, that we, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, as principals and James D. Leary, William B. Kirk and Edgar Alvord, as sureties, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars to be paid to the United States; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 8th day of June, 1901.

Whereas lately, to wit, on this 8th day of ——, 1901, at a circuit court of the United States in and for the southern district of
313 New York in a proceeding therein pending, an order was entered denying the application of the above-named petitioners for a writ of *habeas corpus*.

And the said petitioners having duly obtained an appeal from the said order to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said circuit court to review the same:

Now, the condition of the above obligation is such that if the said petitioners, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, shall prosecute said appeal to effect and shall answer all costs if they shall fail to make the said appeal good, then this obligation to be void; else to remain in full force and effect.

B. D. GREENE.	[SEAL.]
JOHN F. GAYNOR.	[SEAL.]
WM. T. GAYNOR.	[SEAL.]
EDWARD H. GAYNOR.	[SEAL.]
JAMES D. LEARY.	[SEAL.]
D. B. KIRK.	[SEAL.]
EDGAR ALVORD.	[SEAL.]

Sealed and delivered and taken and acknowledged this 8th day of June, 1901, before me.

JOHN A. SHIELDS,
U. S. Commissioner.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

James D. Leary, William B. Kirk and Edgar Alvord, each being duly sworn, for himself says that he is worth more than the
314 sum of five hundred dollars over and above all his just debts and liabilities.

JAMES D. LEARY.
W. B. KIRK.
EDGAR ALVORD.

Sworn to before me this 8th day of June, 1901.

JOHN A. SHIELDS,
U. S. Comm'r.

Approved as to form, amount and sufficiency.

E. HENRY LACOMBE,
United States Circuit Judge.

(Endorsed:) United States Supreme Court.—In the matter of the petition of Benjamin D. Greene *et al.* etc. against William Henkel, United States marshal, etc.—Supersedeas bond.—Kellogg & Rose, att'ys for appellants, 120 Broadway, New York.—U. S. circuit court, Filed Jun- 8, 1901, John A. Shields, clerk.

315 By the Hon. E. Henry Lacombe, one of the justices of the circuit court of the United States of the second circuit.

To Hon. Henry L. Burnett, United States attorney for the southern district of New York, and to William Henkel, Esq., United States marshal in and for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the Capitol in the city of Washington in the District of Columbia on the 6th day of July 1901, pursuant to a petition, allowance and notice of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor are appellants and you the said marshal are appellee, to show cause, if any there be, why the final order of the said circuit court in said petition, allowance and notice of appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan in the city of New York, in the district and circuit above mentioned this 8 day of June in the year of our Lord one thousand nine hundred and one.

E. HENRY LACOMBE,
United States Circuit Judge.
KELLOGG & ROSE,
Attorneys for Appellants,
120 *Broadway, Manhattan, New York City, New York.*

316 [Endorsed:] F. & A. B. 1875 United States circuit court. Southern dist. of New York. In the matter of the petition of Benjamin D. Greene *et al.*, etc. against William Henkel, United States marshal, etc. Citation. Kellogg & Rose, att'ys for appellants 120 Broadway, New York. Due and timely service of a copy of within citation is hereby admitted. Dated New York, 8 June 1901. Wm. Henkel U. S. marshal Henry L. Burnett U. S. attorney U. S. circuit court. Filed Jun- 8 1901 John A. Shields, clerk.

317 At a stated term of the circuit court of the United States, in and for the southern district of New York, held at the United States court and post-office building in the borough of Manhattan, of the city of New York, on the 8th day of June 1901.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Petition of BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. GAYNOR for a Writ of *Habeas Corpus*.

BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and Edward H. Gaynor, Appellants,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, Appellee.

An appeal having been duly taken to the Supreme Court of the United States by the above-named petitioners and appellants from an order this day entered herein denying their application for a writ of *habeas corpus*,

Now, on motion of Kellogg & Rose, attorneys for the petitioners, it is

318 Ordered that pending the said appeal the custody of the said Benjamin D. Greene, John F. Gaynor William T. Gaynor and Edward H. Gaynor shall not be disturbed and that they and each of them remain in the custody in which they are at present, under the warrant issued by Addison Brown, United States district judge on the 28th day of May 1901, and be kept and detained in such custody pending and until the determination of the said appeal by the said Supreme Court of the United States and the further order of the court thereon.

E. HENRY LACOMBE,
U. S. Circuit Judge.

On application of the appellants, it is

Ordered that United States Commissioner Shields take recognizances in the sum of twenty-five thousand dollars for the appearance of the appellant, Benjamin D. Greene; in the sum of twenty-five thousand dollars for the appearance of the appellant, John F. Gaynor; in the sum of ten thousand dollars for the appearance of the appellant, William T. Gaynor; in the sum of ten thousand dol-

lars for the appearance of the appellant, Edward H. Gaynor,
319 on the entry of the final order in the United States circuit court upon the mandate of the Supreme Court of the United States.

Dated, New York, June 8 1901.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York.—In the matter of the petition of Benjamin D. Greene and o'rs for a writ of *habeas corpus*.—Benjamin D. Greene and others, app'lts ag'st William Henkel, U. S. marshal, appellee.—Order as to custody and bail.—Kellogg & Rose, att'ys for appellants, 120 Broadway, New York.—U. S. circuit court, Filed Jun- 8, 1901, John A. Shields, clerk.

320 UNITED STATES OF AMERICA, }
Southern District of New York. }

Be it remembered that on the 8th day of June A. D., 1901, before me, John A. Shields, one of the United States commissioners, duly appointed by the district court of the United States for the southern district of New York in the second circuit, to take acknowledgments of appeal affidavits and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the provisions of the act of Congress in that behalf, personally came Benjamin D. Greene, principal, and James D. Leary, surety, and severally acknowledged themselves to owe to the United States of America, that is to say: the said Benjamin D. Greene, the sum of twenty-five thousand dollars, and the said James D. Leary the sum of twenty-five thousand dollars, separately to be levied and made on their respective goods, chattels, lands and tenements to the said United States, if default shall be made in the condition following, to wit:

Whereas the said Benjamin D. Greene was detained in the custody of William Henkel, as United States marshal for the southern district of New York under commitment and warrant of removal to the southern district of Georgia, granted by Hon. Addison Brown, judge of the United States district court for the southern district of New York on the 28th day of May, 1901, and

321 Whereas the said Benjamin D. Greene made an application to the United States circuit court before Hon. E. Henry Lacombe, circuit judge, on the 8th day of June 1901, for a writ of *habeas corpus* directed to said William Henkel, United States marshal in and for the southern district of New York, requiring said marshal to bring and have said Benjamin D. Greene before said circuit court, together with the true cause of his detention, and

Whereas on the 8th day of June 1901, the said E. Henry Lacombe, United States circuit judge, did make his final order denying the said application for a writ of *habeas corpus* and remanding the said Benjamin D. Greene to the custody of the said marshal for removal

to the southern district of Georgia under the order of the said district judge, and

Whereas the said Benjamin D. Greene has appealed from said final order to the Supreme Court of the United States, and

Whereas the said E. Henry Lacombe, United States circuit judge, did thereupon allow such appeal and order that pending said appeal the custody of said Benjamin D. Greene should not be disturbed and did also order that the said Benjamin D. Greene be enlarged upon bail in the sum of twenty-five thousand dollars for his appearance to answer the exigency and determination of said appeal
322 and to personally abide the final decision and determination of said Supreme Court of the United States in that behalf.

Now, therefore, the condition of this obligation is such that if the said Benjamin D. Greene shall duly personally appear in the said United States circuit court for the southern district of New York to answer the exigency and determination of said appeal and personally abide the final decision and determination of said Supreme Court of the United States and of said circuit court of the United States upon the mandate of said Supreme Court of the United States and obey and abide the orders of said circuit court of the United States and not depart without leave upon the conditions aforesaid and upon the entry of said orders upon said appeal, then this recognizance to be void, otherwise to be and remain in full force and virtue.

B. D. GREENE. [SEAL.]
JAMES D. LEARY. [SEAL.]

Taken and acknowledged before me the day and year first above written.

JOHN A. SHIELDS,
United States Commissioner.

323 SOUTHERN DISTRICT OF NEW YORK, *ss:*

James D. Leary of the city of New York, being duly sworn, says that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

JAMES D. LEARY.

Sworn to before me this 8th day of June 1901.

JOHN A. SHIELDS,
United States Commissioner.

Recognizance approved as to form and sufficiency.

E. HENRY LACOMBE,
United States Circuit Judge.

(Endorsed:) United States Supreme Court.—In the matter of the petition of Benjamin D. Greene, *et al.*, etc. against William Henkel, United States marshal, etc.—Recognizance of Benjamin D. Greene.—Kellogg & Rose, att'ys for appellants, 120 Broadway, New York.—U. S. circuit court, Filed Jun- 8, 1901, John A. Shields, clerk.

324 UNITED STATES OF AMERICA, }
Southern District of New York. }

Be it remembered that on the 8th day of June, A. D., 1901, before me, John A. Shields, one of the United States commissioners, duly appointed by the district court of the United States for the southern district of New York in the second circuit, to take acknowledgments of appeal, affidavits and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the provisions of the act of Congress in that behalf, personally came John F. Gaynor, principal, and William B. Kirk, surety, and severally acknowledged themselves to owe to the United States of America, that is to say: the said John F. Gaynor, the sum of twenty-five thousand dollars and the said William B. Kirk, the sum of twenty-five thousand dollars, separately to be levied and made on their respective goods, chattels, lands and tenements to the said United States, if default shall be made in the condition following, to wit:

Whereas the said John F. Gaynor was detained in the custody of William Henkel, as United States marshal for the southern district of New York under commitment and warrant of removal to the southern district of Georgia, granted by Hon. Addison Brown, judge of the United States district court for the southern district of New York on the 28th day of May 1901, and

325 Whereas the said John F. Gaynor made an application to the United States circuit court before Hon. E. Henry Lacombe, circuit judge, on the 8th day of June 1901, for a writ of *habeas corpus* directed to said William Henkel, United States marshal in and for the southern district of New York, requiring said marshal to bring and have said John F. Gaynor before said circuit court, together with the true cause of his detention, and

Whereas on the 8th day of June 1901, the said E. Henry Lacombe, United States circuit judge, did make his final order denying said application for a writ of *habeas corpus* and remanding the said John F. Gaynor to the custody of the said marshal for removal to the southern district of Georgia under the order of the said district judge, and

Whereas the said John F. Gaynor has appealed from said final order to the Supreme Court of the United States, and

Whereas the said E. Henry Lacombe, United States circuit judge, did thereupon allow such appeal and order that pending said appeal the custody of said John F. Gaynor should not be disturbed and did also order that the said John F. Gaynor be enlarged upon bail in the sum of twenty-five thousand dollars for his appearance to answer the exigency and determination of said appeal and

326 to personally abide the final decision and determination of said Supreme Court of the United States in that behalf.

Now, therefore, the condition of this obligation is such that if the said John F. Gaynor shall duly personally appear in the said United States circuit court for the southern district of New York, to answer the exigency and determination of said appeal and personally abide

the final decision and determination of said Supreme Court of the United States and of said circuit court of the United States upon the mandate of said Supreme Court of the United States and obey and abide the orders of said circuit court of the United States and not depart without leave upon the conditions aforesaid and upon the entry of said orders upon said appeal, then this recognizance to be void, otherwise to be and remain in full force and virtue.

JOHN F. GAYNOR. [SEAL.]
W. B. KIRK. [SEAL.]

Taken and acknowledged before me the day and year first above written.

JOHN A. SHIELDS,
United States Commissioner.

327 SOUTHERN DISTRICT OF NEW YORK, *ss:*

William B. Kirk of the city of Syracuse, being duly sworn, says that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

W. B. KIRK.

Sworn to before me this 8th day of June, 1901.

JOHN A. SHIELDS,
U. S. Commissioner.

Recognizance approved as to form and sufficiency.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Supreme Court.—In the matter of the petition of Benjamin D. Greene, *et al.* etc. against William Henkel, United States marshal, etc.—Recognizance of John F. Gaynor.—Kellogg & Rose, att'ys for appellants, 120 Broadway, New York.—U. S. circuit court, Filed Jun- 8, 1901, John A. Shields, clerk.

328 UNITED STATES OF AMERICA, }
Southern District of New York. }

Be it remembered that on the 8th day of June A. D., 1901, before me, John A. Shields, one of the United States commissioners, duly appointed by the district court of the United States for the southern district of New York in the second circuit, to take acknowledgments of appeal, affidavits and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the provisions of the act of Congress in that behalf, personally came Edward H. Gaynor, principal, and Edgar Alvord, surety, and severally acknowledged themselves to owe to the United States of America, that is to say: the said Edward H. Gaynor the sum of ten thousand dollars, and the said Edgar Alvord, the sum of ten thousand dollars, separately to be levied and made on their respective goods, chattels, lands and tenements to the said United States, if default shall be made in the condition following, to wit:

Whereas the said Edward H. Gaynor was detained in the custody of William Henkel, as United States marshal for the southern district of New York under commitment and warrant of removal to the southern district of Georgia, granted by Hon. Addison Brown, judge of the United States district court for the southern district of New York on the 28th day of May, 1901, and

329 Whereas the said Edward H. Gaynor made an application to the United States circuit court before Hon. E. Henry Lacombe, circuit judge, on the 8th day of June 1901, for a writ of *habeas corpus* directed to said William Henkel, United States marshal in and for the southern district of New York, requiring said marshal to bring and have said Edward H. Gaynor before said circuit court, together with the true cause of his detention, and

Whereas on the 8th day of June 1901, the said E. Henry Lacombe, United States circuit judge, did make his final order denying the said application for a writ of *habeas corpus* and remanding the said Edward H. Gaynor to the custody of the said marshal for removal to the southern district of Georgia under the order of the said district judge, and

Whereas the said Edward H. Gaynor has appealed from sail final order to the Supreme Court of the United States, and

Whereas the said E. Henry Lacombe, United States circuit judge, did thereupon allow such appeal and order that pending said appeal the custody of said Edward H. Gaynor should not be disturbed and did also order that the said Edward H. Gaynor be enlarged upon bail in the sum of ten thousand dollars for his appearance to answer the exigency and determination of said appeal and to

330 personally abide the final decision and determination of the Supreme Court of the United States in that behalf.

Now, therefore, the condition of this obligation is such that if the said Edward H. Gaynor shall duly personally appear in the said United States circuit court for the southern district of New York to answer the exigency and determination of said appeal and personally abide the final decision and determination of said Supreme Court of the United States and of said circuit court of the United States upon the mandate of said Supreme Court of the United States and obey and abide the orders of said circuit court of the United States and not depart without leave upon the conditions aforesaid and upon the entry of said orders upon said appeal, then this recognizance to be void, otherwise to be and remain in full force and virtue.

EDWARD H. GAYNOR. [SEAL.]
EDGAR ALVORD. [SEAL.]

Taken and acknowledged before me the day and year first above written.

JOHN A. SHIELDS,
United States Commissioner.

331 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Edgar Alvord of the city of Syracuse, being duly sworn, says that he is worth the sum of twenty thousand dollars over and above all his just debts and liabilities.

EDGAR ALVORD.

Sworn to before me this 8th day of June, 1901.

JOHN A. SHIELDS,
United States Commissioner.

Recognizance approved as to form and sufficiency.

E. HENRY LACOMBE,
United States Circuit Judge.

(Endorsed:) United States Supreme Court.—In the matter of the petition of Benjamin D. Greene, *et al.* etc. against William Henkel, United States marshal, etc.—Recognizance of Edward H. Gaynor.—Kellogg & Rose, att'ys for appellants, 120 Broadway, New York.—U. S. circuit court, Filed Jun- 8, 1901, John A. Shields, clerk.

332 UNITED STATES OF AMERICA,
Southern District of New York.

Be it remembered that on the 8th day of June, A. D. 1901, before me, John A. Shields, one of the United States commissioners, duly appointed by the district court of the United States for the southern district of New York in the second circuit, to take acknowledgments of appeal, affidavits and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the provisions of the act of Congress in that behalf, personally came William T. Gaynor, principal, and William B. Kirk, surety, and severally acknowledged themselves to owe to the United States of America, that is to say: the said William T. Gaynor the sum of ten thousand dollars, and the said William B. Kirk, the sum of ten thousand dollars, separately to be levied and made on their respective goods, chattels, lands and tenements to the said United States, if default shall be made in the condition following, to wit:

Whereas the said William T. Gaynor was detained in the custody of William Henkel, as United States marshal for the southern district of New York under commitment and warrant of removal to the southern district of Georgia, granted by Hon. Addison Brown, judge of the United States district court for the southern district of New York on the 28th day of May, 1901, and

333 Whereas the said William T. Gaynor made an application to the United States circuit court before Hon. E. Henry Lacombe, circuit judge, on the 8th day of June, 1901, for a writ of *habeas corpus* directed to said William Henkel, United States marshal in and for the southern district of New York, requiring said marshal to bring and have said William T. Gaynor before said circuit court, together with the true cause of his detention, and

Whereas on the 8th day of June 1901, the said E. Henry Lacombe,

United States circuit judge, did make his final order denying the said application for a writ of *habeas corpus* and remanding the said William T. Gaynor to the custody of the said marshal for removal to the southern district of Georgia under the order of the said district judge, and

Whereas the said William T. Gaynor has appealed from said final order to the Supreme Court of the United States, and

Whereas the said E. Henry Lacombe, United States circuit judge, did thereupon allow such appeal and order that pending said appeal the custody of said William T. Gaynor should not be disturbed and did also order that the said William T. Gaynor be enlarged upon bail in the sum of ten thousand dollars for his appearance to answer the exigency and determination of said appeal and
334 to personally abide the final decision and determination of the Supreme Court of the United States in that behalf.

Now, therefore, the condition of this obligation is such that if the said William T. Gaynor shall duly personally appear in the said United States circuit court for the southern district of New York to answer the exigency and determination of said appeal and personally abide the final decision and determination of said Supreme Court of the United States and of said circuit court of the United States upon the mandate of said Supreme Court of the United States and obey and abide the orders of said circuit court of the United States and not depart without leave upon the conditions aforesaid and upon the entry of said orders upon said appeal, then this recognizance to be void, otherwise to be and remain in full force and virtue.

WM. T. GAYNOR. [SEAL.]
W. B. KIRK. [SEAL.]

Taken and acknowledged before me the day and year first above written.

JOHN A. SHIELDS,
United States Commissioner.

335 SOUTHERN DISTRICT OF NEW YORK, *ss:*

William B. Kirk of the city of Syracuse, being duly sworn, says that he is worth the sum of twenty thousand dollars over and above all his just debts and liabilities.

W. B. KIRK.

Sworn to before me this 8th day of June 1901.

JOHN A. SHIELDS,
U. S. Commissioner.

Recognizance approved as to form and sufficiency.

E. HENRY LACOMBE,
United States Circuit Judge.

(Endorsed:) United States Supreme Court.—In the matter of the petition of Benjamin D. Greene, *et al.* etc. against William Henkel, United States marshal, etc.—Recognizance of William T. Gaynor.—Kellogg & Rose, att'ys for appellants, 120 Broadway, New York.—U. S. circuit court, Filed Jun- 8, 1901, John A. Shields, clerk.

336 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 336 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, appellants against Henry L. Burnett, United States attorney for the southern district of New York and William Henkel, Esq. United States marshal, southern district of New York appellees, as the same remain of record and on file in my office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 1st day of July in the year of our Lord one thousand nine hundred and one and of the Independence of the said United States the one hundred and twenty-sixth.

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Benjamin D. Greene *et al.* appellants *vs.* William Henkel, U. S. marshal, southern dist. of New York, appellee Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 18,218. S. New York—C. C. U. S. Term No. 365. Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, appellants, *vs.* William Henkel United States marshal in & for the southern district of New York. Filed July 10th, 1901.

No. 365.

By. of Rose for Appts. Con'mo

Filed Oct. 24, 1901.

Office Supreme Court U.S.
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JAMES H. McKENNEY
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

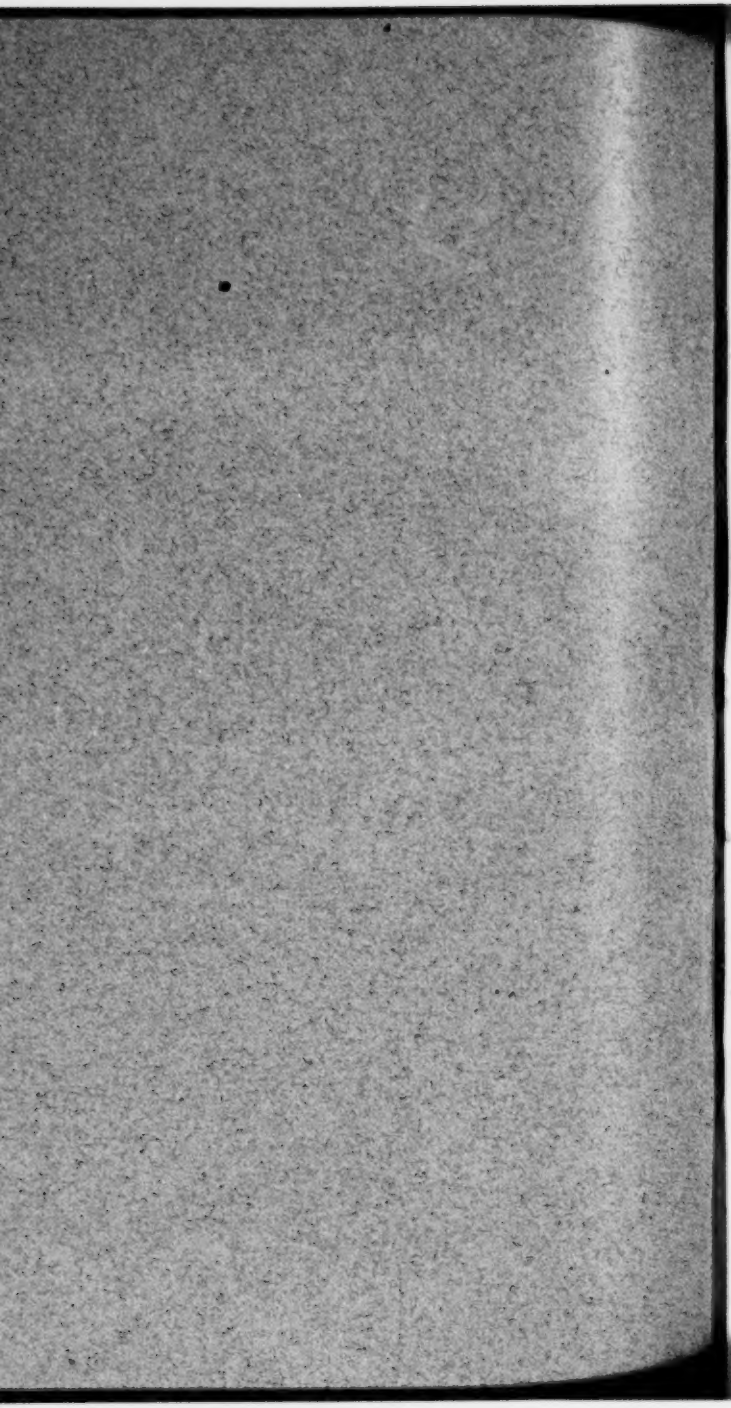
BENJAMIN D. GREENE, JOHN F. GAYNOR, William T. Gaynor, and Edward H. Gaynor, appellants,

against

WILLIAM HENKEL, UNITED STATES Marshal in and for the Southern District of New York.

No. 365.

BRIEF FOR PLAINTIFFS-IN-ERROR ON MOTION TO ADVANCE.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

BENJAMIN D. GREENE, JOHN F. Gaynor, William T. Gaynor and Edward H. Gaynor,

Appellants,

against

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

No. 365.

The Solicitor General, moving to advance this case, and have the Court assign a day for argument, bases the motion upon certain "reasons," and in stating them makes so many misstatements and errors, that unless they are corrected the Court will be under a misapprehension as to the real facts, and the defendants might seem to acquiesce by their silence.

They, therefore, briefly call attention to and correct these mistakes, or some of them.

We do not mean to assert that the learned Solicitor General has intentionally made misstatements, but assume, that as the reasons given are nearly all outside of the record, he has been obliged to rely on statements of others, and has been misled or inadvertently fallen into error.

In order that the Court may have the matter in a compact form we print the "reasons" and add to each one our remarks, changes or additions, which we print in italics.

"1. On December 8, 1899, at the Novem-
"ber term, 1899, of the United States Dis-
"trict Court for the Eastern Division of the
"Southern District of Georgia, a true bill of
"indictment was found by the Grand Jury,
"charging, in several counts, the defendants,
"Benjamin D. Greene, John F. Gaynor,
"William T. Gaynor and Edward H. Gay-
"nor and others, with conspiracy with Ober-
"lin M. Carter, late captain of the United
"States Army and engineer officer in charge
"of the Savannah engineering district, to
"defraud the United States and conspiracy
"to present false accounts, in violation of
"Sections 5440 and 5438 of the Revised
"Statutes."

THE PARAGRAPH NUMBERED ONE IS CORRECT.

"2. On December 14th, 1899, the defend-
"ants, Benjamin D. Greene, John F. Gay-
"nor, William T. Gaynor and Edward H.
"Gaynor, were arrested in the Southern
"District of New York on a warrant issued
"by John H. Shields, United States Com-
"missioner, based upon an affidavit charging
"them with having committed, in the East-
"ern Division of the Southern District of
"Georgia, the offense described in the in-
"dictment, to which affidavit a certified copy
"of the indictment was attached and re-
"ferred to."

THIS PARAGRAPH SHOULD BE CORRECTED AND CHANGED SO AS TO INCLUDE THE FOLLOWING:

The defendants, learning of the indictment be-

ing found against them, as stated in paragraph One, voluntarily appeared before Commissioner Shields, in the Southern District of New York, and gave bail for their further appearance before him for their examination on the question whether there was probable cause to believe that they were guilty of the offense alleged against them by the complaint of the Assistant District Attorney.

"3. In due course the defendants were "brought before the Commissioner for a "hearing, and the Government offered in "evidence a duly certified copy of the "indictment, together with the testimony of "witnesses, fully identifying the defendants "as being the persons so indicted and proving "they had been in the Eastern Division of "the Southern District of Georgia during the "period in which they were charged with "having committed the offense described in "the indictment. The defendants offered "no testimony to show they were not the "persons indicted, or to show they had not "been in the Eastern Division of the Southern "District at the time the offense was charged "to have been committed, but did consume "several months in offering testimony tend-"ing to disprove their guilt of the charge set "out in the indictment, all of which being "directed solely to the question of guilt or "innocence on the merits of the case was "excluded by the Commissioner as incompe-"tent."

THIS PARAGRAPH SHOULD ALSO BE AMENDED SO AS TO INCLUDE THE FOLLOWING:

On such examination the defendants vainly sought to introduce evidence to show there was no probable cause to believe that the offense had been committed, or that they were guilty of an offense.

That on the objection of the U. S. Attorney all evidence in their behalf was excluded.

"4. On February 20, 1900, the defendants
" having finally ceased to offer testimony,
" the Commissioner duly made and entered
" his order on the complaint, finding probable
" cause to believe the defendants guilty, and
" committing them to the custody of the
" marshal to await a warrant for their re-
" moval from the Southern District of New
" York to the Southern District of Georgia
" for trial. Thereupon a motion for a war-
" rant to remove them was promptly made
" before the United States District Judge,
" Hon. Addison Brown, the record of the
" proceedings before the Commissioner being
" produced and full argument had."

THIS PARAGRAPH SHOULD BE CORRECTED SO AS TO INCLUDE OR STATE THE FOLLOWING:

The Commissioner, acting solely on the certified copy of the alleged indictment, found there was probable cause to believe an offense had been committed, and the defendant should be removed to Georgia for trial on said alleged indictment. To this paragrayh also should be added that while this matter was pending before Judge Brown, in the Southern District of New York, the Federal Grand Jury, sitting in Savannah, Georgia, with the knowledge and assent of the United States Attorney (being the same officer who was prosecuting the case in New York), made a presentment to the Court which strongly censured the Commissioner for allowing the defendants to offer testimony, and severely criticised Judge Brown for delay in taking time to examine the questions raised by the defendants. That the Judge who presided at the time said alleged presentment was made was the same Judge

who presided when the alleged indictment was found, and that he not only received the presentment and ordered it on file, but stated in court that he had written to the President of the United States on the same subject, and ordered that a copy of the presentment be sent to the Congress of the United States. That this same Judge, in another Division of the Southern District of Georgia, in charging a Grand Jury, criticised the action of the New York officials, and dissented from the construction of the removal act which had then been announced by Judge Brown.

> " 5. On April 4, 1900, after having taken " time to consider, Judge Brown delivered his " opinion, holding that a valid indictment " supported by evidence identifying the de- " fendants as the persons charged in the in- " dictment and establishing the fact they " were in the district where the indictment " was found at the time when the offense " was charged to have been committed, was " not sufficient to authorize the issues of a " warrant of removal over the objection of " the defendants; that a certified copy of the " indictment was to be treated by the Com- " missioner merely as an *ex parte* affidavit, " subject to be rebutted by evidence offered " by the defense, precisely as in a case where " there is no indictment."

THIS PARAGRAPH SHOULD BE MODIFIED AND CORRECTED AS FOLLOWS:

Judge Brown held that the eight counts of this indictment purporting to charge a conspiracy and overt acts were invalid and insufficient as a pleading and as to the remaining counts, he would not pass " definitely " on them, but that as to the whole indictment, treating it as an affidavit, it was so self-

contradictory and inconsistent that it furnished no facts or evidence upon which a finding of probable cause could be based, and that the act of the Commissioner in refusing to receive the evidence offered by the defendants was error, and he refused to allow the defendants to be removed to Georgia for trial on this indictment.

"6. On June 26, 1900, in pursuance of this "opinion, Judge Brown made an order send- "ing the case back to the Commissioner "'for further competent testimony offered "by either side in accordance with the opin- "ion rendered herein.'

"On July 6, 1900, in pursuance of this "order, the hearing before the Commissioner "was recommenced. The Government was "compelled to, and did, introduce a large "number of witnesses, and offered an im- "mense amount of documentary evidence to "establish the guilt of the defendants, but "closed its case on August 13, 1900.

"The defense then consumed more than "three months in introducing its evidence, "closing on November 16, 1900.

"Two days were consumed by the Govern- "ment in rebuttal; the case upon the testi- "mony being closed November 19, 1900.

"The oral evidence before the Commis- "sioner covered some 5,000 typewitten pages, "and several trunks full of documents were in- "troduced. Voluminous briefs were printed, "oral arguments made, and the case finally "submitted to the Commissioner, who, on "February 25, 1901, a year and five days "after his first finding, made a second find- "ing of probable cause of guilt, this time "upon the entire record of evidence, and "again ordered the defendants committed to

"the custody of the marshal to await the "warrant of removal.

"At once a second motion for a warrant "was made to Judge Brown, of the United "States District bench."

THIS PARAGRAPH OF THE "REASONS" OF THE LEARNED SOLICITOR GENERAL SHOULD BE PREFACED BY THE FOLLOWING:

The learned United States Attorney, instead of acquiescing in the decision of Judge Brown, appealed to the Attorney General of the United States, and that officer prepared a bill and sent the same to the Judiciary Committees of both Houses of Congress, amending the removal section (Section 1014, U. S. R. S.), with a letter urging its passage; that the bill so presented and urged was not passed; indeed it never left one of the committees, from which fact the inference is drawn that Congress believed the law as it then stood protected the rights of the United States and the citizen, and that the construction of Judge Brown of this law was right and proper.

That these efforts on the part of the Government officials to reverse Judge Brown used up the time from April 4th to June 26th, which is now charged to these defendants as part of the great delay in this case.

"7. On May 15, 1901, Judge Brown, having "taken time to consider, delivered his opinion, "holding that not only had the Government "established probable cause to believe there "was fraud in the letting of the contracts "for river and harbor improvements by Car-"ter and the defendant contractors, but "that——

"It is shown beyond question that Captain "Carter, the employee of the Government,

"and the engineer in immediate charge of
"the work on the Government's behalf, had,
"for several years immediately preceding
"the contract referred to in the indictment,
"received from the contractors continuously,
"through his father-in-law, in many divi-
"sions of profits, one-third of the final net
"proceeds of each contract, remaining for
"division among the chief contractors, and
"that this one-third amounted in the aggre-
"gate to over $700,000.

"On May 28, 1901, in accordance with this
"opinion Judge Brown issued his warrant
"to the marshal for the removal of the de-
"fendants to Georgia for trial."

THIS PARAGRAPH SHOULD BE AMENDED SO AS TO CORRECT CERTAIN MISSTATEMENTS AND TO INCLUDE THE FOLLOWING FACTS.

Judge Brown did not hold that the Government had "established probable cause, &c.," as stated by the learned Solicitor-General, but distinctly held that he was powerless to pass on this question, as that had been passed upon by the Commissioner, and that one of the questions in this case before this Court is the correctness of such decision of Judge Brown.

Judge Brown also held and decided that the question whether there was any valid indictment because of the uncontradicted proof as to the validity of the Grand Jury that found it, was "a new "one, arising upon the construction and effect of an "important statute, and not decided or in any way "passed upon by the Supreme Court as the ultimate "authority."

As to the effect of probable cause and his action on such question, he held and decided (to quote from his opinion):

" *As respects the finding of probable cause,*
" *I have carefully considered the very ex-*
" *tended briefs and arguments of counsel,*
" *and have examined the voluminous evi-*
" *dence with a view to ascertain whether*
" *there was competent evidence before the*
" *Commissioner sufficient in itself to sustain*
" *his finding of probable cause. Under the*
" *rule above stated it is not for the Judge, on*
" *an application for removal, to compare*
" *different parts of the testimony in order to*
" *determine their relative weight, or to sub-*
" *stitute his own judgment for that of the*
" *Commissioner, even though it might on the*
" *whole evidence be different. By this, how-*
" *ever, I do not mean to be understood as*
" *expressing any opinion whatsoever on the*
" *merits of the case. The defendants have*
" *given a great deal of evidence tending to*
" *show that their contracts were fairly ob-*
" *tained, their work well and honestly done,*
" *and that the Government has not been de-*
" *frauded a dollar.*"

" 8. But they were not so removed, for
" immediately upon being taken into custody
" by the marshal they applied to the Circuit
" Court of the United States for the Southern
" District of New York for a writ of habeas
" corpus, alleging they were being illegally
" held in custody by the marshal, and at-
" tached to the application the processes and
" pleadings in the proceedings before the Com-
" missioner and before the United States Dis-
" trict Judge, and the several findings of the
" Commissioner and the findings and the
" opinions of the District Judge, together
" with only so much of the evidence as
" related to the attack made on the legality
" of the impaneling of the Grand Jury,

"the contention of the defendants being "that the indictment was void because "of irregularities in impaneling the Grand "Jury, and was, moreover, defective in "form and substance, and that there "could be no removal upon a complaint "supported by proof of guilt, if their con- "tention as to the insufficiency of the indict- "ment could be sustained. It is hardly "necessary to say that the United States "Circuit Court (Judge Lacombe) denied the "application for the writ. From this order "denying their application the defendants "made, on June 8, 1901, an appeal to this "Court."

As to this paragraph it may be said that it is a fair inference that Judge Lacombe, with the opinion of Judge Brown before him, denied the application for the writ of habeas corpus as the quickest and surest way to get the decision of this Court upon a question that was "a new one, aris- "ing upon the construction and effect of an im- "portant statute," and which has never been passed upon by this Court.

In Conclusion.

IT SEEMS HARDLY FAIR TO PUT BEFORE THIS COURT STATEMENTS AS TO THE CONVICTION AND INCARCERATION OF CARTER, AS THESE FACTS CAN HAVE NO BEARING ON THE QUESTIONS IN THIS CASE OR ON THE MOTION TO ADVANCE; MOREOVER, THE LEGALITY OF THAT CONVICTION AND IMPRISONMENT IS RAISED IN A CASE NOW ON THE CALENDAR OF THIS COURT. IT IS FURTHER SUBMITTED THAT IT IS GROSSLY UNFAIR AND IMPROPER TO CHARGE THESE DEFENDANTS WITH DELAYING THIS CASE WHEN ALL

OF THE TIME THAT HAS ELAPSED SINCE THE FINDING OF THE ALLEGED INDICTMENT HAS BEEN USED UP BY THE PROSECUTING OFFICERS IN OBTAINING INFORMATION HOW TO PROCEED IN A REMOVAL CASE OR IN CORRECTING THEIR ERRORS IN SUCH PROCEEDINGS.

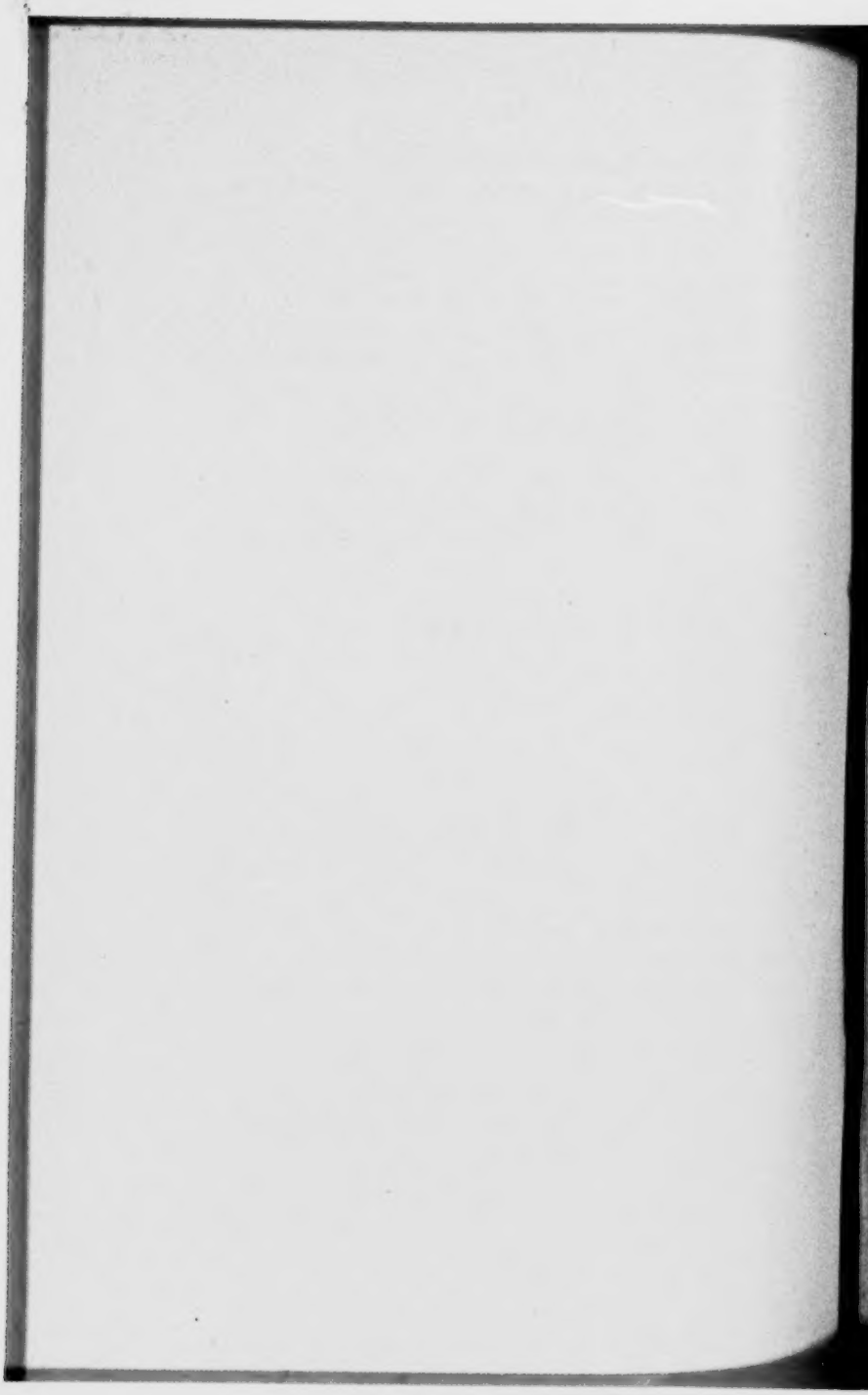
THEY HAVE TRIED TO BRING ABOUT A "VIRTUAL "ABDUCTION UNDER THE FORMS OF LAW," AND BECAUSE THEY HAVE FAILED, NOW RAISE A HUE AND CRY AGAINST THE DEFENDANTS ON THE GROUND OF DELAY.

THE DEFENDANTS NOW ARE AND ALWAYS HAVE BEEN READY TO BE TRIED BEFORE ANY IMPARTIAL, UNPREJUDICED COURT ON ANY VALID LEGAL INDICTMENT, BUT THEY HAVE AND WILL OBJECT TO BEING SENT FOR TRIAL BEFORE A COURT THAT THEY BELIEVE WILL NOT GIVE THEM A FAIR TRIAL, AND BE THERE TRIED ON AN ALLEGED INDICTMENT FOUND BY POSSIBLY A PACKED, CERTAINLY A PICKED, ILLEGAL GRAND JURY.

WHILE IT DOES NOT SEEM THAT THE REASONS URGED ENTITLE THE CASE UNDER THE RULES TO BE PREFERRED OR HEARD OUT OF ITS REGULAR ORDER, THEY ARE QUITE WILLING TO HAVE THE CAUSE ADVANCED, AND DO NOT DESIRE TO BE CONSIDERED AS OPPOSING THE MOTION EXCEPT TO THE EXTENT ABOVE STATED.

IF THE COURT SHOULD BE OF OPINION THAT THE MOTION TO ADVANCE SHOULD BE GRANTED, THEY ONLY ASK THAT A DAY BE FIXED FOR HEARING WHICH WILL GIVE AMPLE TIME FOR PROPER PREPARATION.

ABRAM J. ROSE,
Of Counsel for Plaintiffs in Error.



No. 365.
Br. of Hill, Kellogg, Rose & Pette
for Appellants.

Office Supreme Court U. S.
FILED
NOV 13 1901
JAMES H. KENNEDY, Clerk

Filed Nov. 13, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

BENJAMIN D. GREENE, JOHN F. GAYNOR, William T. Gaynor, and Edward H. Gaynor, appellants,

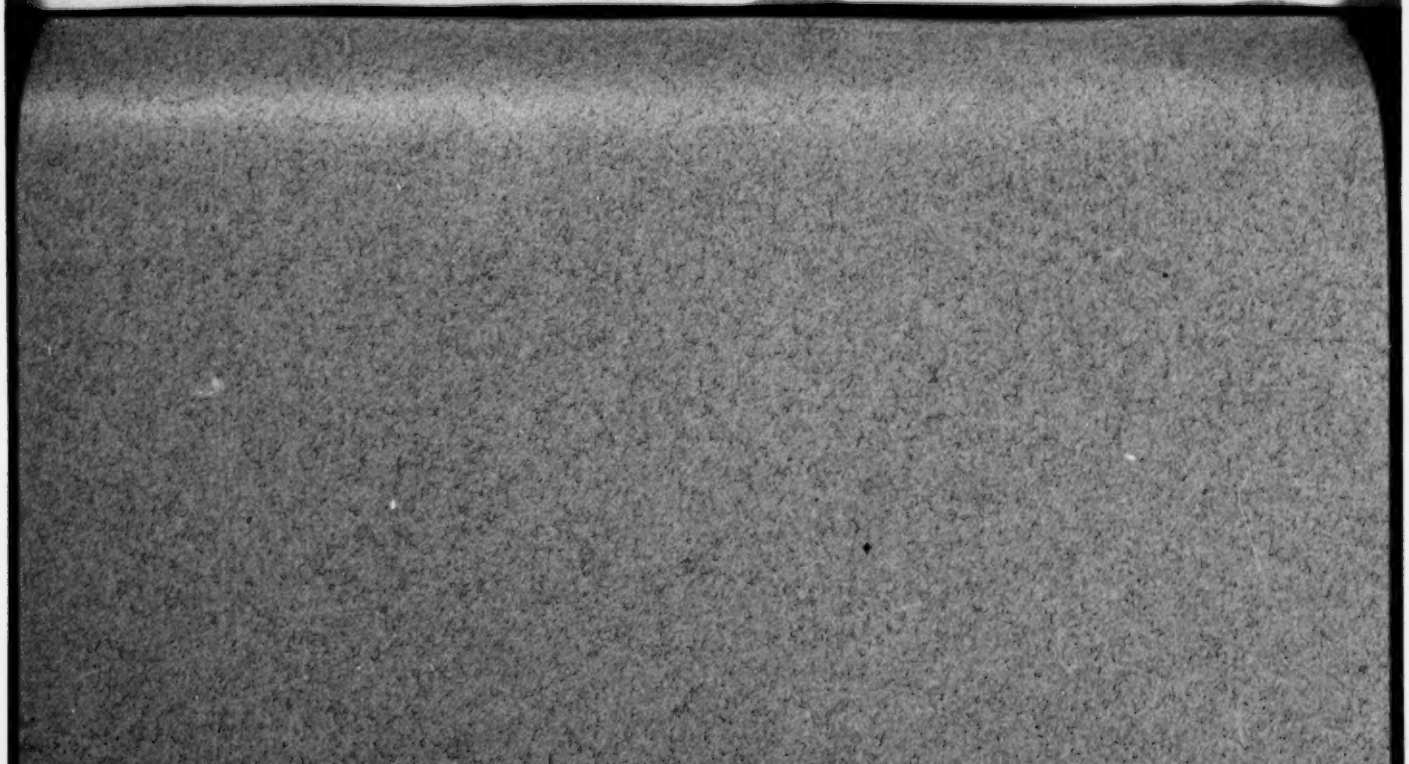
against

WILLIAM HENKEL, UNITED STATES MARSHAL in and for the Southern District of New York, appellee.

No. 365.

BRIEF FOR APPELLANTS.

DAVID B. HILL,
L. LAFLIN KELLOGG,
ABRAM J. ROSE,
ALFRED C. PETTÉ
Of Counsel.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

BENJAMIN D. GREENE, JOHN F. Gaynor, William T. Gaynor and Edward H. Gaynor, *Appellants,* *against* WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, *Respondent.*	No. 365.

BRIEF FOR APPELLANTS.

Appeal from a final order of the Circuit Court the United States for the Southern District of New York Denying the Appellants' Application for a Writ of Habeas Corpus.

Statement.

This is an appeal from an order made by Circuit Judge E. Henry Lacombe, denying the appellants' application for a writ of habeas corpus.

The petition for the writ presented to the Circuit Court shows that the petitioners were, at all the

times mentioned therein, citizens of the United States; Benjamin D. Greene being a resident of the State of Connecticut, John F. Gaynor and William T. Gaynor being residents of the State of New York, and Edward H. Gaynor being a resident of the State of Massachusetts, and that none of them was in any way connected with the land or naval forces of the said United States.

That they are imprisoned and restrained of their liberty in the custody of William Henkel, United States Marshal for the Southern District of New York, by virtue of a warrant of removal under Section 1014 of the Revised Statutes of the United States, signed by the Honorable Addison Brown, Judge of the District Court of the United States for the Southern District of New York, and not by virtue of any judgment, decree or final order thereof.

That the cause of said imprisonment is that warrants for their arrest were issued by John A. Shields, United States Commissioner, and that certain proceedings were thereafter had before such Commissioner, who committed them to await a warrant for their removal to the Eastern Division of the Southern District of Georgia for trial upon an alleged indictment purporting to have been found by the Grand Jury for the Eastern Division of the Southern District of Georgia, and that upon such proceedings, and upon application of the United States Attorney for the Southern District of Georgia, Judge Addison Brown, of the District Court of the United States for the Southern District of New York, granted a warrant of removal.

That the basis of the proceedings before said Commissioner, and upon which the warrants for their arrest were issued, was a complaint made by one Clarence S. Houghton, Assistant United States Attorney for the Southern District of New York, based upon information contained in the said alleged indictment found by the said alleged Grand

Jury, on the 8th day of December, 1899, and which said indictment purported to have been found under, and in pursuance of, Sections 5438 and 5440 of the Revised Statutes of the United States, and charges the appellants with conspiracy to defraud the said United States.

That the petitioners voluntarily appeared before said Commissioner and demanded an examination on the charges made against them.

That upon such examination the appellants moved to dismiss the complaint, because it set forth no crime or offence under the laws of the United States, which motion was denied, and an exception taken.

That thereafter the complaint was amended, whereupon the motion to dismiss was renewed and again denied, and an exception taken.

That the Government thereupon offered in evidence a certified copy of the indictment set out in the amended complaint, and evidence was given on its behalf tending to show the identity of the appellants with the persons charged in the indictment.

That after the offer of such proof, the appellants offered evidence tending to show that there was no probable cause to believe that the offence charged in the complaint had been committed by them, which evidence was all rejected by the Commissioner, and these appellants were held to await a warrant of removal by the United States District Judge.

That thereafter a motion was made before the Hon. Addison Brown, United States District Judge, by the Government for a warrant for their removal to the Southern District of Georgia for trial upon the indictment referred to in the complaint.

That this motion was opposed by the appellants and, after due deliberation, was denied by the District Judge.

That among the reasons stated by him in his opinion refusing removal, were the following:

"The stenographer's notes of the proceed-
" ings returned by the Commissioner con-
" sisted of about 1,100 pages, showing, how-
" ever, no other evidence of the commission
" of the offence than a certified copy of the
" indictment. Some evidence was given as
" to the identity of the defendants as the
" persons charged, and this was not seriously
" contested. Aside from this and the argu-
" ments of counsel, the whole record consists
" of little except rulings upon the evidence
" on behalf of the defendants sought to be
" introduced, and numerous exhibits, all of
" which, so far as pertained to the merits or
" tended to show the innocence of the ac-
" cused and the want of probable cause, were
" rejected, mostly on the ground that the
" question of guilt or innocence should only
" be heard and determined upon the trial
" under the indictment. * * * As respects
" procedure, the present case is identical with
" that of *In re* Dana (68 Fed. Rep., 886), in
" which this Court, upon careful considera-
" tion, pointed out the course necessary to
" be pursued in cases of this character under
" Section 1014 of the United States Revised
" Statutes, and under the law of this State
" thereby virtually adopted. The views
" there expressed seem to have been ap-
" proved by Lacombe, J., in Price's case
" (83 Fed Rep., 830), where the course in-
" dicated in the Dana case was followed
" by the examination of several witnesses
" to show probable cause as well as the
" production of an exemplified copy of
" the indictment. It was also approved in
" the case of *In re* Wood (95 Fed. Rep., 288),

"and, so far as I am aware, it has not been "disapproved in any subsequent reported "case. In view of these decisions, which "were repeatedly called to the Commissioner's attention, I find it difficult to understand the disregard of them in the rejection "of the great mass of competent evidence "and exhibits offered in the defendant's behalf. In that decision it was pointed out "that the proceeding for commitment and "removal under Section 1014 is an original "proceeding to be conducted according to "the laws of the State in similar proceedings "before committing magistrates; that the "object of the proceeding is to enable the "Commissioner to ascertain for himself "whether from the proof of facts and circumstances produced before him there is "probable cause to believe the defendants "guilty of the offence charged. * * * "By a singular inversion, however, the best "reason for the admission of the defendant's "proposed evidence, namely, its tendency to "show innocence of the charge and the lack "of probable cause, was in this instance "made the reason for excluding it. A certified copy of the indictment having been "received by the Commissioner, it was "thereupon contended by the prosecution, "and virtually ruled by the Commissioner, "that the evidence was closed as respects "the question of guilt, and that no evidence "disproving it could be allowed, since that "would be 'trying the issue' here instead "of in Georgia. Thus, although the right to "show want of probable cause was admitted in form, it was in substance denied;

"since whatever would disprove the alleged "offence was for that very reason excluded.',

See Opinion. Brown, J., Record, pp. 45-47.

That upon this decision an order was made by the District Judge directing that the motion, as it then stood, be denied "AND THE MATTER SENT BACK "TO THE COMMISSIONER FOR FURTHER COMPETENT "TESTIMONY OFFERED BY EITHER SIDE IN ACCORD-"ANCE WITH THE OPINION RENDERED HEREIN."

See Order, Record, p. 55, fol. 101.

That pursuant to said order further proceedings were had before Commissioner Shields, and a large number of witnesses were examined on behalf of the Government, and on behalf of these appellants, which evidence was reported to the District Judge for the Southern District of New York, together with a finding by the Commissioner to the effect that the evidence in his judgment established a case of probable cause requiring these appellants to be held to await a warrant for their removal.

See Record, pp. 3-4, fols. 7-8.

That the matter again came before the District Judge and a second application was made to him for a warrant.

That this application was opposed by these appellants on the grounds, among others, that there was NO VALID INDICTMENT upon which they could be tried, for the reason that the indictment had not been found and returned by a grand jury CONSTITUTED AND DRAWN IN ACCORDANCE WITH THE PROVISIONS OF THE STATUTES OF THE UNITED STATES, and that the finding of the Commissioner that there was probable cause to believe that an offence had

been committed was without force or effect, INASMUCH AS UNDER THE ORDER SENDING THE PROCEEDINGS BACK FOR FURTHER TESTIMONY, THE COMMISSIONER ACTED ONLY AS THE ARM OF THE COURT TO TAKE THE TESTIMONY, AND THAT THE QUESTION OF PROBABLE CAUSE SHOULD BE PASSED UPON BY THE DISTRICT JUDGE.

That the motion for a warrant was granted WITHOUT ANY FINDING OF PROBABLE CAUSE BY THE DISTRICT JUDGE, and an opinion was rendered, in which, among other things, it was stated that the question of illegality in the formation of the Grand Jury finding the indictment should not prevail, even though established as a matter of fact,

1st. BECAUSE THE QUESTION IS A NEW ONE, ARISING UPON THE CONSTRUCTION AND EFFECT OF AN IMPORTANT STATUTE AND NOT DECIDED OR IN ANY WAY PASSED UPON BY THIS COURT AS THE ULTIMATE AUTHORITY; AND

2d. BECAUSE UNDER THE RULING OF THIS COURT IN THE CASE OF AGNEW *v.* THE UNITED STATES (165 U. S., 36), THERE WAS AT LEAST SOME QUESTION WHETHER THE OBJECTION TO THE LEGALITY OF THE PROCEEDINGS HAD NOT BEEN WAIVED.

That as grounds for refusing to pass upon the question of probable cause it was further stated in the opinion that it was not for the Judge, on an application for removal, to compare different parts of the testimony in order to determine their relative weight or to substitute his judgment for that of the Commissioner, even though it might on the whole evidence be different; that the defendants had given a great deal of evidence "TENDING TO SHOW THAT "THEIR CONTRACTS WERE FAIRLY OBTAINED, THEIR "WORK WELL AND HONESTLY DONE, AND THAT THE "GOVERNMENT HAS NOT BEEN DEFRAUDED OF A "DOLLAR," and that the Government, on the other

hand, had given evidence tending to a contrary conclusion.

The petition further alleges that the imprisonment and detention of the appellants is without authority in law, and that the said proceedings before the Commissioner were illegal, and the warrant of removal was illegally issued and in violation of the FOURTH AND FIFTH ARTICLES OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND SECTION 1, OF THE FOURTEENTH ARTICLE OF AMENDMENT THERETO, WHICH PROVIDE THAT THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS AGAINST UNREASONALE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED; THAT NO WARRANT SHALL ISSUE BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PERSON TO BE SEIZED; THAT NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, AND THAT NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW.

That the appellants were not in the Southern District of Georgia at the time the alleged Grand Jury finding the indictment was drawn, nor at the time it was presented and filed in the United States District Court for the Eastern Division of the Southern District of Georgia; that they were not informed of the drawing of such alleged Grand Jury prior to the time of the filing thereof; and that prior to their arrest on the warrant of Commissioner Shields, they had not been arrested and held to await the action of any grand jury in the Southern District of Georgia, or elsewhere, nor had they, prior to the proceedings on their appearance before said Commissioner, any opportunity to object to said Grand Jury, or any action by it.

That at the time of the drawing of said Grand

Jury, November 22d, 1899, Hon. Emory Speer was the United States District Judge for the Southern District of Georgia; that he drew the said alleged Grand Jury, and held the term of the court at which the said indictment was presented and filed; and by law is required to hold the several terms of the United States Court for the Eastern Division of the Southern District of Georgia, and will hold the term of said court for the second Tuesday in August, 1901, at which term and time these appellants were by said warrant of removal to appear for trial; and that unless the Circuit Court would hear and determine the questions relating to the illegality of the Grand Jury and its right to act in the premises, the said District Judge of the Southern District of Georgia would have before him, and be obliged to pass on, the question of the validity and legality of the orders made by him relating to the formation of said Grand Jury, and the legality of his own acts in drawing the same.

The petition further shows that at the time of the filing of said indictment, Marion Erwin was and now is, United States District Attorney for the Southern District of Georgia, and is also Assistant United States Attorney in charge of these proceedings in the Southern District of New York.

That while the appellants were in New York pending such removal proceedings and under bail, the said Marion Erwin caused to be served upon the appellants' attorney in those proceedings a notice as follows:

"Office of the United States Attorney,
"Southern District of Georgia
"Macon, Ga., March 5th, 1900.

"ABRAM J. ROSE, Attorney,
"New York City.

"You are hereby notified, as attorney for "Benjamin D. Greene, Edward H. Gaynor,

"John F. Gaynor and William T. Gaynor, in "the case of United States *v.* Benjamin D. "Greene and others, charged with conspiracy "to defraud, in which case the plaintiffs "above named represented by you are de "fendants, that the above case will be "called in the United States District Court "at Savannah, Georgia, on Monday, March "12th, 1900, at 10:30 o'clock A. M., in "order that the defendants to the in "dictment in said case may appear in per "son and interpose any objections which "they may desire to urge as to the empan "elling of the Grand Jury that returned the "true bill of indictment in said case, and "such other objections as they may make to "the validity of said indictment.

"Very respectfully,

"MARION ERWIN,
"United States Attorney."

That the said notice, together with the answer made by Mr. Rose thereto, was, upon motion of said Marion Erwin and by the direction of Judge Speer, ordered on file as a part of the record in the proceedings under the alleged indictment in the Southern District of Georgia, and which order is as follows:

"In the District Court of the United "States for the Eastern Division of the "Southern District of Georgia.

"UNITED STATES *vs.* "BENJAMIN D. GREENE, *et al.*	Indictment Conspiracy to Defraud. Filed December 8th, 1899.

"The defendants, Benjamin D. Greene,

"Edward H. Gaynor, John F. Gaynor, "William T. Gaynor and Michael A. Con- "nally, in the above stated case, being called, "the United States Attorney presents the "following described documents: Notice "from the said United States Attorney, under "date of March 5th, 1900, to Abram J. Rose, "Esq., attorney for said Benjamin D. Greene, "Edward H. Gaynor, John F. Gaynor and "William T. Gaynor, return served March "8th, 1900, that said case would be called "in this court on this the 12th day of March, "1900. The answer of the said Abram J. "Rose, under date of March 8th, 1900, "to said notice and a copy of the "answer of the said United States At- "torney to the said Abram J. Rose under "date of March 12th, 1900, also notice from "said United States Attorney to M. A. Con- "nally, Esq., under date of March 10th, "1900, that said case would be called on this "12th day of March, 1900, and return of "service thereon of March 10th, 1900, and "the said Benjamin D. Greene, Edward H. "Gaynor, John F. Gaynor and William T. "Gaynor not appearing, and the said Michael "Connally appearing:

"It is ordered by the Court that said docu- "ments hereto attached be filed with the "Clerk of this Court. In open court, March "12th, 1900.

"EMORY SPEER,
"*United States Judge.*"

The petition further alleges that as these appellants are informed and believe the said Marion Erwin claims and insists that because of their failure to appear pursuant to the above notice, they are barred and estopped in that court from questioning the

legality and validity of said alleged Grand Jury, and that unless the Circuit Court in the Southern District of New York would hear and pass on said questions they would be tried on an alleged indictment never found by any legally authorized Grand Jury, but presented and filed in court by a body of men in whose selection and drawing the statutes of the United States relating thereto were wholly disregarded and set at naught.

That said alleged Grand Jury finding said indictment was drawn from a jury box that did not have 300 names of persons therein qualified to act as jurors at the time of said drawing, and that said box was not prepared by a Jury Commissioner and Clerk of the Court by each putting in alternately the name of a person, as required by law.

The petition further shows that the alleged offence charged in said indictment is an infamous crime, and that their removal to answer the same without presentment or indictment by a Grand Jury would be in violation of the rights secured to them by the Constitution of the United States.

That the Marshal for the Southern District of New York, and persons acting under his orders and authority, are detaining these appellants, and are about to remove them to the Eastern Division of the Southern District of Georgia for trial upon the said pretended indictment, and in pursuance of the proceedings had before said Commissioner and the warrants of removal issued thereupon by the said District Judge, and that such detention is without authority in law, and that any further proceedings in pursuance thereof would be, and are, unlawful.

See Petition, pp. 1-6.

An application for the issuance of a writ of habeas corpus was made upon this petition to Hon.

E. Henry Lacombe, United States Circuit Judge for the Southern District of New York, and was denied.

See Order, Record, pp. 164-165.

A petition for an appeal from the order denying the application was allowed by Judge Lacombe, and it is upon such appeal that this proceeding now comes before this Court.

See Record, pp. 165-167.

Assignment of Errors.

The errors assigned are that the Court erred:

1. In denying the petitioners' application for a writ of habeas corpus.

2. In refusing to grant said application.

3. In deciding that it appears from the petition itself that the relators were not entitled to such writ.

4. In holding that the alleged Grand Jury which presented and filed the alleged indictment, all as mentioned in the petition, was a valid Grand Jury, or that it was legally and properly drawn.

5. In holding that the said alleged indictment stated an offence against the laws of the United States.

6. In holding that the United States District Court for the Southern District of Georgia has jurisdiction to try the petitioners under said alleged indictment.

7. In holding that the warrant of removal made by the United States District Judge for the South-

ern District of New York was issued upon a finding of probable cause.

8. In holding that the petitioners were in custody of the said William Henkel, United States Marshal in and for the Southern District of New York, and deprived of their liberty by him by due process of law.

9. In not holding the action of the said alleged Grand Jury, on the 8th day of December, 1899, in the Eastern Division of the Southern District of Georgia, was, so far as the petitioners were concerned, of no force and effect, and that the alleged indictment filed by such alleged Grand Jury furnished no ground or basis upon which the petitioners could be tried or removed from the Southern District of New York for trial.

See Assignment of Errors, pp. 167-168.

POINTS.

BY THE DENIAL OF THE APPLICATION FOR A WRIT THE CIRCUIT COURT, IN EFFECT, HOLDS THAT A PERSON CHARGED WITH AN INFAMOUS CRIME MAY BE REMOVED FOR TRIAL UPON AN ALLEGED INDICTMENT FOUND BY A BODY OF MEN NOT CONSTITUTING A LEGAL GRAND JURY DRAWN IN CONFORMITY WITH THE STATUTES OF THE UNITED STATES REGULATING THE PRACTICE AND PROCEDURE IN THAT REGARD, BUT, ON THE CONTRARY, EMPANELLED IN TOTAL DISREGARD OF THOSE PROVISIONS; AND WITHOUT ANY FINDING OF PROBABLE CAUSE BY THE DISTRICT JUDGE ISSUING THE WARRANT OF REMOVAL AFTER THE RETURN AND REPORT OF THE PROCEEDINGS TO HIM UNDER AN ORDER DIRECTING THE COMMISSIONER SIMPLY TO TAKE FURTHER TESTIMONY UPON THAT

QUESTION. THAT THEREBY NO CONSTITUTIONAL RIGHT OF THESE APPELLANTS SECURING THEM IN THEIR PERSONS AGAINST UNREASONABLE SEIZURES, AND PROVIDING THAT NO WARRANT SHALL ISSUE BUT UPON PROBABLE CAUSE, AND THAT NO PERSON MAY BE HELD TO ANSWER FOR AN INFAMOUS CRIME UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, AND SHALL NOT BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, WAS VIOLATED, DENIED OR INFRINGED UPON.

ARGUMENT.

Point I.

It was the duty of the Circuit Court to inquire by habeas corpus into the removal proceedings for the purpose of determining whether the District Court for the Southern District of Georgia had jurisdiction of the offense to answer for which the removal was sought; and if any proceedings necessary to confer jurisdiction were unconstitutional the denial of the writ was error reviewable by this Court.

First.—The statute regulating the procedure in cases of removal of offenders against the United States provides that the offender may "by any Jus-"tice or Judge of the United States, or by any Com-"missioner of a Circuit Court to take bail, or by any "Chancellor, Judge of a Supreme Court or Superior "Court, Chief or first Judge of Common Pleas,

"Mayor of the City, Justice of the Peace, or other "magistrate of any State where he may be found "AND AGREEABLY TO THE USUAL MODE OF PROCESS "AGAINST OFFENDERS IN SUCH STATE, and at the ex- "pense of the United States be arrested and im- "prisoned or bailed as the case may be for trial "before such Court of the United States AS BY "LAW HAS COGNIZANCE OF THE OFFENSE"; and that where any offender is committed in any district other than that where the offense is to be tried, it shall be the duty of the Judge of the district where such offender is imprisoned to issue, and of the Marshal to execute a warrant for his removal to the district where the trial is to be had.

See Revised Statutes of the United States, Section 1014.

It has been repeatedly adjudged that the duty of the Judge of the district to whom application is made for removal is not simply perfunctory and ministerial, but judicial; and that the statute should be liberally construed in favor of personal liberty, and to prevent unwarranted seizures of persons by criminal process.

It is always open to the prisoner to show that no offense against the United States has been committed, or that the indictment is bad in form, or that the offense charged cannot be legally tried in the district to which removal is sought, or that it is outlawed, or equally triable where the offender resides and is found.

In the MATTER OF BUELL Circuit Judge Dillon said:

> "In a country of such vast extent as ours "it is no light matter to arrest a supposed "offender and on the mere order of an in- "ferior magistrate remove him hundreds, it "may be thousands, of miles for trial. * * *

"Mere technical defects in an indictment "should not be regarded, but a district judge "who should order the removal of a prisoner "when the only probable cause relied on or "shown was an indictment, and that indict- "ment failed to show any offense against "the laws of the United States, or showed "an offense not committed or triable in the "district to which the removal is sought, "would misconceive his duty and fail to pro- "tect the liberty of the citizen."

In re Buell, 3 Dillon, 116 (Federal cases No. 2102).

The same view was expressed by Circuit Judge Lacombe in the MATTER OF TERRELL:

"There is good cause for holding," says the learned Judge, "that this power should be ex- "ercised liberally whenever the Judge before "whom the questions are raised on applica- "tion for a warrant of removal, or on a ha- "beas corpus, is satisfied, from the face of the "indictment, that were such indictment be- "fore him for trial and demurred to, he would "quash it. This is a country of vast extent, "and it would be a grave abuse of the "rights of the citizens, if, when charged "with alleged offenses committed, perhaps, "in some place he had never visited, he "were removed to a district thousands of "miles from his home to answer to an in- "dictment fatally defective on any mere "theory of a comity which would require "the sufficiency of the indictment to be test "ed only in the particular court in which it "is pending."

In the Matter of Terrell, 51 Fed. Rep., 213.

And in the MATTER OF DOIG, District Judge Hoffman observed that where a District Judge is applied to for a warrant of removal and it appears from the indictment on which the warrant is asked that the act alleged does not constitute an offense against the United States, or that no trial can be had in the district to which the removal is sought, it is his duty to refuse the warrant.

In re Doig, 4 Fed. Rep., 193.

And District Judge Hammond, in UNITED STATES *v.* BRAWNER, referring to the power of the District Judge to refuse removal, expressed similar views and said that the very purpose of conferring the power upon the District Judge to order a removal, was to secure the judicial sanction of a supervisory judge for the action of the committing magistrate; that the necessary implication from the method of procedure adopted by the statute "is that the "'judge of the district,' whether it be the District "Judge or some other, as is intimated *In re* Bailey, "1 Woolw., 422, it may be, must judicially deter- "mine whether the prisoner shall be taken to "another district for trial and that he may refuse "his warrant where it appears that the removal "should not be made or where he would admit the "party to bail."

United States *v.* Brawner, 7 Fed. Rep., 86.

In UNITED STATES *v.* LEE, District Judge Wellborn summed up the facts necessary to authorize a warrant of removal, as follows:

1. That the defendant has been committed in the district from which removal was sought.

2. That the indictment sufficiently charges an offense against the United States.

3. THAT THE COURT TO WHICH REMOVAL IS SOUGHT HAS JURISDICTION OVER THE OFFENSE.

"The first of these requirements," he said, "is "clearly expressed in the statute—said Section "1014; the other two, although not expressed in "terms, are necessarily implied."

United States *v.* Lee, 84 Fed. Rep., 26.

It was then, we submit, the duty of the District Judge to whom application for removal was made to inquire whether the District Court of Georgia had, in the words of the statute, cognizance of the offense, and if it affirmatively appeared that the proceedings taken to confer jurisdiction were unconstitutional, he should have refused a warrant and discharged the appellants.

Second.—IT WAS ALSO THE RIGHT AND THE DUTY OF THE CIRCUIT COURT, BY HABEAS CORPUS TO INQUIRE INTO THE QUESTION OF JURISDICTION OF THE DISTRICT COURT OF GEORGIA, AND TO DISCHARGE THE APPELLANTS, IF THE PROCEEDINGS TAKEN AGAINST THEM IN THAT COURT WERE WITHOUT AUTHORITY.

This was so expressly decided by this Court in

Horner *v.* United States, 143 U. S., 207.

It is also the established rule that the courts of the United States have the right to interpose by writ of habeas corpus and discharge a prisoner when the proceedings taken against him have violated or would infringe upon his constitutional rights.

Ex parte Lange, 85 U. S., 163.
Ex parte Siebold, 100 U. S., 404.
Ex parte Ayers, 123 U. S., 443.
Ex parte Bain, 121 U. S., 1.
Ex parte Sawyer, 124 U. S., 250.
Ex parte Snow, 130 U. S., 274.
Ex parte Neilsen, 131 U. S., 176.

If, then, any constitutional immunity of the appellants was violated in the removal proceedings, or will be violated by their removal to the State of Georgia for trial, the application for the writ was improperly denied, and the order denying the same is reviewable by direct appeal to this Court.

See Act of March 3, 1891, 23 Statutes at Large, 826.
Carter *v.* Roberts, 177 U. S., 496.

Point II.

The constitutional right of the appellants to be secure in their persons against unreasonable seizures and not to be deprived of their liberty without due process of law, has been and will be violated and infringed upon by their removal to the State of Georgia for trial, for the reason that by the record in the removal proceedings and by the petition in this proceeding, it expressly appears that there is nothing before the District Court for the Southern District of Georgia which they can be held to answer so far as the offense charged against them is concerned, because the indictment was not found by a legally constituted Grand Jury empanelled and sworn according to the provisions of the Revised Statutes of the United States.

First.—THE OFFENSE WITH WHICH THESE APPELLANTS ARE CHARGED IS AN INFAMOUS CRIME.

The indictment, upon which the removal proceedings were based, charges these appellants with conspiracy to defraud the United States under Sections 5438 and 5440 of the Revised Statutes, the punishment for which may be a fine of ten thousand dollars or imprisonment for five years at hard labor.

See Revised Statutes, Sections 5438–5440.

By the express decisions of this Court such an offense is an infamous crime.

Ex parte Wilson, 114 U. S., 417.
Mackin *v.* United States, 117 U. S., 348.
Ex parte Bain, 121 U. S., 1.

Second.—By the Fifth Article of Amendment to the Constitution, it provided that "No person shall "be held to answer for a capital OR OTHERWISE INFAMOUS CRIME UNLESS ON PRESENTMENT OR INDICTMENT OF A GRAND JURY, except in cases arising in "the land or naval forces, or in the militia, when "in actual service, in the time of war or public "danger; nor shall any person be subject for the "same offense to be twice put in jeopardy of life or "limb; nor shall be compelled in any criminal case "to be a witness against himself, NOR BE DEPRIVED "OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE "PROCESS OF LAW."

See Constitution, Fifth Amendment.

The causes which led up to this express enactment in the Constitution are well known.

The colonists were familiar with the history of

the English people and the abuses which made necessary Magna Charta and the Bill of Rights.

They knew that Magna Charta had secured the right to a jury trial, but they were also alive to the disregard of its provisions by the House of Tudor, as well as the attempts by the then English King to transport them "beyond the seas to be tried for pretended offenses," and thus deprive them of the right to a trial by a jury of their peers in the place where the act was committed, and as said by Mr. Justice Davis, "the history of the world had taught "them that what was done in the past might be "attempted in the future."

Ex parte Milligan, 71 U. S., 2.

It was not strange, therefore, that they should insist that their rights should be guarded by provisions whose meaning could not be misconstrued nor evaded.

In the body of the Constitution itself it was provided that "the trial of all crimes, except in cases of "impeachment, shall be by jury, and such trial "shall be held in the State where the said crimes "shall have been committed; but when not com-"mitted, within any State, the trial shall be at "such place or places as the Congress may by "law have directed."

Clause 3, Article 3.

Speaking of the original provisions, Mr. Justice Story says that although these provisions of a trial by jury in criminal cases were thus constitutionally preserved to all citizens, "the jealousies and alarms of opponents of the Constitution were not quieted. They insisted that a Bill of Rights was indispensa-

ble, and that upon this further auxiliary rights ought to have been secured."

See Story's Constitution, 5th Edition, Section 1782.

So jealous were the people of any limitation of this great right that it was claimed that the Constitution should define the right of trial by jury in both civil and criminal cases.

It was argued that the mode of trial by jury was well settled and needed no further specification, but this did not satisfy the claimants for further provisions.

It was also pointed out that in civil cases different modes of trial were in use among the several states and that it would be impossible to assimilate the practice.

The latter objection was at last yielded although not without strong opposition.

In trials for crime, however, the opposition could not be appeased and the outcome was the enactment of the Fifth and Sixth amendments.

Third.—IN THE PROSECUTION OF INFAMOUS CRIMES THIS COURT HAS VIGOROUSLY UPHELD THE PROVISIONS OF THE CONSTITUTION RESPECTING THE NECESSITY OF A PRESENTMENT OR INDICTMENT BY A GRAND JURY AS AN ABSOLUTE PREREQUISITE TO THE JURISDICTION OF THE COURT TO PUT THE ACCUSED UPON HIS TRIAL.

Ex parte Wilson (*supra*).
Mackin *v.* U. S. (*supra*).
Ex parte Bain (*supra*).

In *ex parte* BAIN (*supra*) the petitioner had been indicted under Section 5209 for making a false report as cashier of the Exchange National Bank of Norfolk to the Comptroller of the Currency.

After the finding of the indictment the defendant *demurred and his demurrer was sustained.*

Thereafter, upon motion of the Government, it was ordered by the Court that the indictment be amended, and the petitioner entered his plea of not guilty, was tried and a verdict of guilty found against him.

He petitioned for a writ of habeas corpus on the ground that no indictment for the offence upon which he had been tried had been found by a grand jury as provided in the Fifth Article of Amendment to the Constitution. This Court held that he was entitled to the writ.

Mr Justice Miller writing the opinion says,

> "It is never to be forgotten that in the "construction of the language of the Consti- "tution here relied on, as, indeed, in all other "instances where construction becomes nec- "essary, we are to place ourselves as nearly "as possible in the condition of the men who "framed that instrument. Undoubtedly the "framers of this Article had for a long time "been absorbed in considering the arbitrary "encroachments of the Crown on the liberty "of the subject, and were imbued with the "common law estimate of the value of a "grand jury as part of its system of criminal "jurisprudence. They, therefore, must be "understood to have used the language which "they did in declaring that no person shall "be called to answer for any capital or other- "wise infamous crime, except upon an in- "dictment or presentment of a Grand Jury "in the full sense of its necessity and of its "value. *We are of the opinion that an in- "dictment found by a grand jury was indis- "pensable to the power of the Court to try the "petitioner for the crime with which he was*

"*charged.* The sentence of the Court was "that he should be imprisoned in the peni- "tentiary at Albany. The case of *ex parte* "Wilson (114 U. S., 418), and the later one of "Mackin *v.* U. S., (117 U. S., 348), establish "the proposition that this prosecution was for "an infamous crime within the meaning of "the constitutional provision. It only re- "mains to consider whether this change in "the indictment deprived the Court of the "power of proceeding to try the petitioner "and sentence him to the imprisonment pro- "vided for in the Statute.

"We have no difficulty in holding that the "indictment on which he was tried was no "indictment of a grand jury. The decis "ions which we have already referred to as "well as sound principle, require us to hold "that after the indictment was changed, it "was no longer the indictment of the Grand "Jury who presented it. Any other doctrine "would place the rights of the citizens which "were intended to be protected by the con- "stitutional provision, at the mercy or con- "trol of the court or prosecuting attorney; "for if it be once held that changes can "be made by the consent or the order of the "Court in the body of the indictment as "presented by the Grand Jury and the "prisoner can be called upon to answer to "the indictment as thus changed, the re- "striction which the Constitution places "upon the power of the Court in regard to "the prerequisite of an indictment in reality "no longer exists. It is of no avail, under "such circumstances to say that the Court "still has jurisdiction of the person and of "the crime; for though it has possession of "the person and would have jurisdiction of

"the crime if it were properly presented by "*indictment, jurisdiction of the offence is* "*gone*, and the Court has no *right to pro-* "*ceed further in the progress of the case for* "*want of the indictment.* IF THERE IS NOTH- "ING BEFORE THE COURT WHICH THE "PRISONER, IN THE LANGUAGE OF THE CON- "STITUTION, CAN BE "HELD TO ANSWER," "HE IS THEN ENTITLED TO BE DISCHARGED SO "FAR AS THE OFFENCE ORIGINALLY PRESENTED "TO THE COURT BY THE INDICTMENT IS CON- "CERNED. THE POWER OF THE COURT TO "PROCEED TO TRY THE PRISONER IS AS MUCH "ARRESTED AS IF THE INDICTMENT HAD BEEN "DISMISSED OR A *nolle prosequi* HAD BEEN "ENTERED. There was nothing before the "Court on which it could hear evidence or "pronounce sentence."

Bain *v.* U. S. (*supra*).

Judge Speer, before whom these appellants will be tried if removed to Georgia, referring to the decisions above mentioned, said:

"*Startling as is the proposition to a people* "*who have been habituated to prosecutions* "*upon information in cases of this character*, "the practice must cease, and hereafter the "courts of the United States will take no "action in the large class of cases where "imprisonment in the State penitentiary "may result, save after presentment or in- "dictment by the Grand Jury."

U. S. *v.* Johannsen, 35 Fed. Rep., 411.

Fourth.—THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF GEORGIA HAS NO COGNIZANCE OF THE OFFENSE AND NO JURISDICTION TO TRY THESE APPEL LANTS THEREON, BECAUSE IT AFFIRMATIVELY AP

PEARS THAT THE PROVISIONS OF THE STATUTES REGULATING THE PROCEDURE IN THE DRAWING OF GRAND AND PETIT JURIES IN THE COURTS OF THE UNITED STATES WERE WHOLLY DISREGARDED AND VIOLATED IN THE EMPANELLING OF THE GRAND JURY FINDING THE ALLEGED INDICTMENT UPON WHICH THE REMOVAL PROCEEDINGS WERE BASED.

1st. By the Act of June 30, 1879, Chapter 52, Section 2 (21 Statutes at Large, page 43), it is provided:

> "That all such jurors (in any court of the "United States), grand and petit, including "those summoned during the session of the "Court, shall be publicly drawn from a box "containing at the time of EACH DRAWING "THE NAMES OF NOT LESS THAN THREE "HUNDRED PERSONS possessing the qualifica- "tions prescribed in Section 800 of the Re- "vised Statutes, WHICH NAMES SHALL BE "PLACED THEREIN BY THE CLERK OF SUCH "COURT AND A COMMISSIONER to be appointed "by the Judge thereof, which commissioner "shall be a citizen of good standing residing "in the district in which such court is held, "and a well known member of the principal "political party in the district in which the "Court is held opposing that to which the "Clerk may belong, THE CLERK AND SUCH COM- "MISSIONER EACH TO PLACE ONE NAME IN SAID "BOX ALTERNATELY, without reference to "party affiliations, until the whole number "required shall be placed therein. * * * No "person shall serve as a petit juror more "than one term in any one year, AND ALL "JURORS TO SERVE IN COURTS AFTER THE "PASSAGE OF THIS ACT SHALL BE DRAWN IN "CONFORMITY HEREWITH."

See Act of June 30th, 1879, 21 Statutes at Large, page 43.

Section 802 of the Revised Statutes provides:

> "Jurors shall be returned from such parts
> "of the district from time to time as the
> "Court shall direct so as to be most favora-
> "ble to an impartial trial, and so as not to
> "incur unnecessary expense or unduly to
> "burden the citizens of any part of the
> "district with such service."

See Revised Statute, Section 802.

These are the requirements of the law which must be strictly followed, in order that there may be a jury qualified to act in the courts of the United States.

2d. *The body of men finding the indictment made the basis of the removal proceedings, was drawn in total disregard of the statutory provisions.*

The undisputed testimony on the removal proceedings, and made part of the petition in this proceeding, shows:

First.—THAT THE JURY WAS NOT DRAWN FROM A BOX CONTAINING, AT THE TIME OF THE DRAWING, THE NAMES OF NOT LESS THAN THREE HUNDRED PERSONS.

Second.—THAT THE NAMES IN SAID BOX WERE NOT PLACED THEREIN BY THE CLERK OF THE COURT AND THE COMMISSIONER APPOINTED BY THE JUDGE THEREOF, BUT BY THE DEPUTY CLERK OF THE COURT AND THE COMMISSIONER, ALTHOUGH THE CLERK WAS IN NO WAY DISABLED TO ACT.

Third.—THAT THE DEPUTY CLERK AND THE COMMISSIONER DID NOT EACH PLACE ONE NAME IN SAID BOX ALTERNATELY, BUT BY THE HANDFUL.

Fourth.—THAT THE DISTRICT JUDGE RETURNED TO THE BOX NAMES ALREADY DRAWN THEREFROM BY HIM.

In order to bring specifically before the Court the illegality in the making up of the jury box and the empanelling of the Grand Jury, reference to the evidence given on the removal proceedings will be made.

It appears that on the 26th of January, 1897, an order was entered by the Judge of the District Court for the Southern District of Georgia, Judge Speer, appointing a Jury Commissioner for the Eastern Division of said district, and directing a revision of the jury box for that division.

The Eastern Division of the Southern District comprises twenty-eight counties, but the District Judge, acting under the provisions of Section 802, directed that the revision should be made by putting into the box only the names of jurors from fourteen counties, namely: Chatham, Bryan, Liberty, Ware, Glynn, Wayne, Pierce, Clinch, Lowndes, Brooks, Thomas, Decatur, Effingham and Bulloch.

See Order, Record, p. 84, fol. 156.
See testimony of Gillespie, Record, p. 97, fol. 183.

The counties of Chatham and Glynn are the most populous in the entire Eastern Division.

After his appointment the Jury Commissioner, Mr. Elliott, qualified, and in April or May, 1897, he and the Clerk of the Court, and the Deputy Clerk, met to revise the jury box.

According to the testimony of Deputy Clerk Gillespie, the names of persons from the fourteen counties named in the order were returned by the clerks of the different counties.

The names so returned were written on sheets of

paper, part of them by Deputy Clerk Gillespie, and part of them by Jury Commissioner Elliott.

The Clerk of the Court, Mr. King, although present and in no way disabled, did not take much active part in the proceedings.

The sheets on which the names were written were cut into slips by the Deputy Clerk, each containing a name. These slips were put into the jury box by Deputy Clerk Gillespie and the Jury Commissioner by the handful, and not alternately one by one, as required by the statute.

In this manner 562 names were put into the box.

Mr. Gillespie's testimony is as follows:

"Q. HOW MANY NAMES WERE THERE?

"A. 562.

"Q. WHAT WAS DONE WITH THOSE TICKETS?

"A. I MADE THEM MYSELF AND PUT THEM "IN THE BOX; MR. ELLIOTT AND MYSELF.

Q. "Mr. Elliott and yourself put them in "the what box?

"A. In the District Court jury box.

"Q. In the District Court jury box? When "was that?

"I have not got the date. It was about "the first of April.

"Q. What year?

"A. 1897.

"Q. At the time that was done who was "present?

"A. Mr. King, the clerk.

"Q. And who else?

"A. Mr. Elliott and myself.

"Q. And yourself. In putting them in "how did you put them in. Tell us what "was done with reference to that.

"A. Well, I made them out on typewrit-"ten paper, in two columns. I cut them "this way, and cut them that way, and "folded them (indicating).

"Q. That made the tickets?

"A. That made the tickets. Mr. Elliott "and I put them in alternately; he would put "in some, and I would put in some others.

"Q. YOU MEAN HE WOULD PUT IN A "BUNDLE?

"A. HE WOULD PUT IN A BUNCH AS I FOLDED "THEM, AND I WOULD PUT IN A BUNCH AS I "FOLDED THEM. They were made out on type-"written paper with space between, down this "side of the sheet and down the other side "and cut in two, then cut cross-wise and "then folded once.

"Q. When folded the names could not be "seen?

"A. No, sir.

"Q. Mr. King was present during all this "time while you were doing this?

"A. While we were putting them in the "box.

"Q. Did he put any in the box himself?

"A. No, sir. Mr. Elliott and I did it my-"self. Mr. King supervised it.

"Q. Mr. King was not sick or disabled?

"A. Oh, no. He was simply sitting there "present. He turned the work over to me, "of course.

"Q. But he was present in the room all the "time?

"A. He was in the room.

"Q. And you cut up a few sheets of these "and folded them?

"A. Yes, sir.

"Q. And Mr. Elliott would cut up a few "sheets of them and fold the tickets?

"A. Yes.

"Q. And then you would put in the bunch "you had folded and he would put in the "bunch he folded?

* * * * * *

"Q. NOW, DID YOU PUT IN ONE TICKET "ALONE, A SINGLE TICKET, AND THEN MR. "ELLIOTT FOLLOWING YOU PUT IN ANOTHER "one?

"A. NO, SIR.

"Q. AND THEN YOU PUT IN A THIRD?

"A. No.

"Q. AND HE PUT IN THE FOURTH AND SO ON "UNTIL THEY WERE ALL PUT IN?

"A. NO, SIR. THEY WERE BUNDLED UP "UNTIL WE GOT A PILE OF THEM AND THEN "WE PUT THEM IN THE BOX TOGETHER.

"Q. Now, from that time until the first of "January, 1900, was there any other revision "of the jury box for the Eastern Division of "the Southern District of Georgia?

"A. No, sir.

"Q. That was the last and only one that "was ever made by Mr. Elliott?

"A. Yes, sir.

"Q. First and last and only one?

"A. Yes, sir."

See testimony of Gillespie, Record, pages 115-117, folios 208-210.

Of the 562 names put into the box 291 were from the county of Chatham and 14 from the county of Glynn, leaving 257 names from the remaining twelve counties.

See testimony of Gillespie, page 117, folio 211.

The first jury from this box was drawn in July, 1897, twenty-eight grand jurors and sixteen petit jurors, a total of forty-four.

A second jury was drawn in February, 1898, thirty names for the grand jury and nineteen for the petit jury, a total of forty-nine.

A third was drawn in January of 1899, thirty names for the grand jury and eighteen for the petit, a total of forty-eight.

A fourth was drawn in May, 1899, thirty names for the grand jury, twenty-six for the petit, a total of fifty-six; making a sum total of one hundred and ninety-seven names drawn from the box up to that date.

Of these, ninety-seven were from Chatham County and two from Glynn County. The balance, ninety-eight, were from the other twelve counties named in the order.

See testimony of Gillespie, Record, pages 117-135.

Taking the one hundred and ninety-seven names drawn from the five hundred and sixty-two originally put into the box, left three hundred and sixty-five names in the box after the drawing of the jury in May, 1899.

On the 22d of November the United States District Attorney, Mr. Erwin, wrote the following letter to Judge Speer of the District Court:

" DEPARTMENT OF JUSTICE,
" Office of United States Attorney,
" Southern District of Georgia.
" MACON, GEORGIA, Nov. 22, 1899.

" To the
" Hon. EMORY SPEER,
" Judge of the District Court of the United States for the Southern District of Georgia.

" *Sir:*

" In pursuance of the provisions of Section " 810 of the Revised Statutes, I have the " honor to state that at the approaching ses-

" sion of the District Court, to be holden in
"the City of Savannah, on December 4th
" next, a grand jury will be needed to pass
" upon certain cases, the most important of
" which involve matters touching frauds al-
" leged to have been committed in river and
" harbor improvements carried on by the
" Government in and about the Cities of Sa-
" vannah and Brunswick, and which received
" much discussion and publicty among
" the people in the counties in which tho e
" cities are situated, making it more difficult
" and expensive to obtain an impartial trial
" of such matters from jurors drawn from
"these counties than if the jury be drawn
" from the other counties of the Eastern
" Division of the district and a jury drawn
" from the latter mentioned counties would
" be most favorable to an impartial trial. On
" behalf of the United States, I therefore re-
" spectfully request that the Court will exer-
" cise the discretion reposed in it by Section
" 802, Revised Statutes, and have grand jur-
" ors for said session returned from the coun-
" ties of the Eastern Division of the District
" other than the Counties of Chatham and
" Glynn.

" Respectfully,

" MARION ERWIN,

" *U. S. District Attorney.*"

Upon receipt of this letter, Judge Speer, on November 22, 1899, made the following order.

" Upon consideration of the attached notice
" from the United States Attorney and the
" matters therein stated, it is ordered by the
" Court that a grand jury be drawn from
" the jury box of the Eastern Division of the

"District and summoned to attend the session "of the Court to be holden in the City of "Savannah on December 4th, 1899, and that "such jury be returned from the counties of "said Eastern Division, other than the "Counties of Chatham and Glynn, it appear- "ing to the Court that such return of jurors "will be most favorable to an impartial trial "and prevent the incurring of unnecessary "expense.

"In open Court, Macon, Ga., November "22, 1899."

See Record, pages 95-96.

On the same day the Grand Jury which found the indictment in question was drawn at Macon, in the Western Division, by the United States District Judge, assisted by the United States Marshal.

At that time, as we have said, there were but three hundred and sixty-five names left in the jury box, which had not previously been drawn. Of these there were two hundred and six names of persons from Chatham and Glynn Counties, being the difference between the whole number from those counties originally put in the box, three hundred and five, and ninety-nine jurors previously drawn. These two hundred and six names were disqualified by the order of November 22, 1899, and left qualified names in the box on that date, the difference between three hundred and sixty-five names not previously drawn and two hundred and six from the counties of Chatham and Glynn, viz., one hundred and fifty-nine names.

The condition of the jury box on November 22, 1899, can best be shown by the following statement:

Names originally put in in April or May, 1897,		562
Names drawn previous to November 22, 1899,		197
Names left,		365
Of these there were disqualified by the order of November 22, 1899, the names originally put in from Chatham and Glynn counties,	305	
Previously drawn from those counties,	99	206
Leaving qualified names in the box on November 22, 1899,		159

In other words, there were only one hundred and fifty-nine names in the box from the twelve remaining counties of the Eastern Division after excluding the names from Chatham and Glynn counties.

From these names the body of men finding the indictment in this case was drawn.

See testimony of Gillespie, Record, pages 136-137.

In view of the importance of the questions coming before the November Grand Jury and which the United States Attorney considered warranted the exclusion of all citizens from the Counties of Chatham and Glynn in order to secure an impartial trial, we submit, the order of November 22d, made by the District Judge, required that there should be a revision of the jury list and that a new jury box should be made containing the names of qualified jurors from the whole number of counties in the Eastern Division, excluding Chatham and Glynn, and not simply the exclusion of the names of jurors from those two counties originally put into the jury box more than two years previously.

The order read "that jurors to be returned from " the counties of said Eastern Division other than " the counties of Chatham and Glynn."

See Order Record, pp. 95–6.

This would seem to require that the jurors should be returned from the twenty-eight counties in the Eastern Division, excluding only Chatham and Glynn.

The jury box made up in the spring of 1897, included names from only twelve counties, after excluding Chatham and Glynn.

The provisions of Section 802, under which the order purports to have been made, moreover, did not authorize the exclusion of names already returned and placed in the box under the order of January 26, 1897, directing a revision of the jury box. That section applies to the *preparation* of the jury lists—not to the drawing of a particular jury. After the lists have been prepared the Judge has no right to pick and choose, but must draw his juries from the whole number of names in the box.

No pretense, however, is made of any compliance with this order by the preparation of a new jury box. As a matter of fact, no new jury box could have been made at that time, because Jury Commissioner Elliott had resigned and no new Commissioner for the Eastern Division had been appointed.

See testimony of Gillespie, Record, p. 99, fols. 185–186

The Government is thus on the horns of a dilemma: If the order of November 22d required the making up of a new box, this concededly was not done. If it did not require the making up of a new jury box it was not authorized, and jurors from Chatham and Glynn were improperly excluded.

But even if the order of November 22d, 1899, did not require the preparation of a new box, which should contain at least three hundred names to be taken from twenty-six counties, then the drawing from the box as originally prepared and depleted by the previous drawings, and by the exclusion of persons from Chatham and Glynn counties, was illegal, because as we have shown, there were only left in the box one hundred and fifty-nine qualified jurors.

On cross-examination it was sought to be shown by the United States Attorney that ballots containing the names of jurors prior to November 23d, 1898, were returned to the box by District Judge Speer on the 22d day of November, 1899, and that, therefore, the number in the box was greater than one hundred and fifty-nine.

Even if we assume, for the purpose of argument, that Judge Speer did return all the names drawn from the twelve counties, other than Chatham and Glynn, named in the order of January 26th, 1897, the number would still be short of the requirements of the statute, for there would only be two hundred and eleven qualified names in the box.

It was shown by the testimony that from the twelve counties, other than Chatham and Glynn, during the time more than one year prior to November, 1899, fifty-two names had been drawn as jurors. Even if these were returned by the District Judge and added to the one hundred and fifty-nine, there would still be only two hundred and eleven qualified names in the box.

Moreover, we insist, that if Judge Speer did return those names to the box HIS VERY ACT INVALIDATED THE ENTIRE DRAWING, as under the express and positive provisions of the statute, no one has the right to put a name in the box EXCEPT THE CLERK OF THE COURT AND THE JURY COMMISSIONER.

TO ALLOW ANY PERSON, OTHER THAN THOSE EXPRESSLY NAMED IN THE STATUTE TO PLACE A NAME IN THE JURY BOX WOULD OPEN THE DOOR TO ALL SORTS OF FRAUD AND ILLEGALITY IN THE EMPANELLING OF JURORS, TO PREVENT WHICH THE EXPLICIT AND UNAMBIGUOUS PROVISIONS OF THE STATUTE WERE ENACTED.

Then, too, the express direction of the statute that the names be placed in the box ONE BY ONE ALTERNATELY BY THE CLERK AND THE JURY COMMISSIONER was completely ignored.

This provision is one of the most important in the statute. It is the way deemed best by Congress to prevent the "packing" of the jury box with names other than those on the list. Its purpose is to make the placing of the names in the box a deliberate and careful proceeding by the Clerk and Commissioner, and to secure jurors without reference to political affiliations.

The statute also expressly provides that the Jury Commissioner must belong to the opposite political party from the Clerk, showing the intention of Congress to make the duty a personal one to be performed by the individuals expressly nominated, and not by deputy or proxy.

In making up the box in question the names were placed therein in bunches by the handful by the DEPUTY CLERK and Commissioner, an utter and vital disregard of the plain and unambiguous provisions of the statute.

To sum this all up we have a jury box prepared in utter disregard of the requirements of the law.

That did not at the time of the drawing under any circumstances contain the number of names required by the law; and that had been tampered with by the putting in of names by a person not authorized to do so.

How can a body of men drawn in defiance of

express statutory requirements be a lawful Grand Jury?

How can any action of theirs be legal or be deemed the due process of law required by the Constitution?

How can a finding by such a body have any pos sible force or effect as the presentment or indictment by a Grand Jury guaranteed to every person by the Constitution before he can be called upon to answer for an infamous crime?

How can these appellants be removed to a distant State to answer for an alleged offense found against them by such an illegally constituted body of men?

Fifth.—THE PROVISIONS OF THE STATUTE REGULATING THE EMPANELLING OF A GRAND JURY ARE MANDATORY, AND A FAILURE TO COMPLY THEREWITH RENDERS AN INDICTMENT INVALID, AND ANY PROCEEDINGS BASED THEREON ILLEGAL AND VOID.

In order concisely to show the illegalities in the drawing of the Grand Jury finding the indictment in the case at bar, we will repeat, in parallel columns, the provisions of the statute regulating jury procedure and the proceedings taken in the Southern District of Georgia.

The Statutory Requirements.	**The Proceedings Empaneling the Grand Jury in Question.**
1. "THAT ALL SUCH JURORS * * * SHALL BE PUBLICLY DRAWN FROM A BOX CONTAINING, AT THE TIME OF EACH DRAWING, THE NAMES OF NOT LESS THAN THREE HUNDRED PERSONS."	1. ON NOVEMBER 22D, 1899, THE DAY OF THE DRAWING OF THE GRAND JURY, THE NAMES OF ONLY 159 QUALIFIED JURORS WERE IN THE BOX FROM WHICH THE JURY WAS EMPANELED, EXCLUDING

THE JURORS PREVIOUSLY DRAWN FROM COUNTIES OTHER THAN CHATHAM AND GLYNN; AND INCLUDING THE NAMES OF THOSE PREVIOUSLY DRAWN FROM SUCH OTHER COUNTIES, 211 NAMES.

2. "WHICH NAMES SHALL HAVE BEEN PLACED THEREIN BY THE CLERK OF SUCH COURT AND A JURY COMMISSIONER."

2. THE NAMES HAD NOT BEEN PLACED IN THE JURY BOX BY THE CLERK OF THE COURT AND THE JURY COMMISSIONER, BUT BY THE DEPUTY CLERK AND THE JURY COMMISSIONER, ALTHOUGH THE CLERK WAS PRESENT AND IN NO WAY DISABLED TO ACT. THE DISTRICT JUDGE, MOREOVER, HAD, AFTER THE ORIGINAL FORMATION OF THE JURY BOX, RETURNED NAMES THERETO OF JURORS DRAWN BY HIM IN THE DRAWING OF JURIES THEREFROM.

3. "THE CLERK AND SAID COMMISSIONER EACH TO PLACE ONE NAME IN SAID BOX ALTERNATELY."

SEE ACT OF JUNE 30TH, 1879.

21 STATUES AT LARGE, P. 143.

3. THE NAMES WERE NOT PLACED IN THE BOX ALTERNATELY, ONE BY THE CLERK AND ONE BY THE JURY COMMISSIONER, BUT IN BUNCHES BY THE HANDFUL BY THE DEPUTY CLERK AND THE JURY COMMISSIONER.

It is entirely unnecessary to argue that the provisions of the statute requiring not less than three hundred names at the time of each drawing, which names shall have been put in the box by the Clerk of the Court and the Jury Commissioner alternately one by one, are mandatory. THE ACT ITSELF SO EXPRESSLY DECLARES.

It reads, "And all juries to serve in courts after "the passage of this act SHALL BE DRAWN IN CONFORMITY HEREWITH."

See Act of June 30, 1879, 21 Statutes-at-Large, page 43.

This was also the opinion of District Judge Addison Brown, who, in his opinion, stated:

"I have no doubt that the requirements of "the act of 1879 are mandatory and that any "substantial departure from its provisions "will invalidate the subsequent proceedings "if due objection is seasonably raised."

See Opinion Brown, J., Record, page 56.

These views are in direct accord with the decisions of the Federal and State Courts.

Neal *v.* Delaware, 103 U. S., 307.
U. S. *v.* Hammond, 2 Woods Circuit Court Reports, 197.
McQuillen *v.* the State, 16 Miss., 587.
Clare *v.* the State, 30 Md., 164.
State *v.* Symonds, 36 Maine, 128.
Brown *v.* Commonwealth, 73 Penn., 321.
Scott *v.* the State, 63 Ala., 59.
Berry *v.* the State, 63 Ala., 126.
Finley *v.* the State, 61 Ala., 201.
Avirett *v.* the State, 76 Md., 510.

Hamlin *v.* Fletcher, 64 Georgia, 519.
State *v.* Newhouse, 29 La. Ann., 824.
State *v.* Akum Griffice, 74 N. C., 316.
State *v.* Rockafellow, 6 N. J. Law, 405.
Brazier *v.* The State, 44 Ala., 387.
People *v.* Thurston, 5 Cal., 69.
Reich *v.* The State, 53 Georgia, 73.

In all of these cases there was no question of actual fraud or wrongful intent on the part of any of the persons connected with the empanelling and drawing of the grand juries, but simply a departure from the statutory mode regulating such procedure.

The grounds for the decisions were that a grand jury does not, by the laws in force in this country, consist of a body of men congregated by the mere order of the Court, or by accident in a jury box, but of the requisite number of competent individuals selected, summoned and sworn according to the forms of law; and that if the law be not followed the body empanelled is an incompetent grand jury without authority to find an indictment against any one; that when a statute lays down in unambiguous terms the mode in which a jury shall be drawn, its provisions are mandatory and may not be departed from in any substantial particular.

In NEAL *v.* DELAWARE (*supra*) the question came before this Court as to the effect of a disregard of the constitutional provisions guaranteeing to every person the equal protection of the laws. The defendant was a man of color, and the grand jurors who returned the indictment, and the petit jurors who were summoned to try the case, were of the white race exclusively. It appearing that all citizens of the African race had been excluded from the list of grand and petit jurors because of their race and color, it was held by this Court that the

judgment of conviction should be reversed, as well as the order denying the motion to quash the indictment and panels of jurors.

Neal *v.* Delaware (*supra*).

In UNITED STATES *v.* HAMMOND (*supra*) the indictment was for the same offense as the one with which these appellants are charged, namely, conspiracy to defraud the United States under Section 5440 of the Revised Statutes. It was claimed that two of the grand jurors by whom the indictment was found were disqualified to act as such, because without duress or coercion they had taken up arms and joined the rebellion against the United States and given it aid and comfort.

The plea was based on Section 820 of the Revised Statutes, which declares that taking up arms as charged should be cause of disqualification and challenge of grand and petit jurors in the courts of the United States.

It was held that this was an absolute disqualification imposed by the statute, and that such a disqualification of even a single grand juror vitiated the indictment.

United States *v.* Hammond (*supra*).

In MCQUILLEN *v.* THE STATE (*supra*) the indictment was for an assault committed with intent to rob. The defendant moved to quash the indictment, on the ground, among others, that the writ of *venire facias* was defective, and that the jurors were not drawn in the presence of the Judge of Probate of the County of Washington, and also were not drawn from the jury book or list, as the statute directed.

In reversing a judgment of guilty, and remanding the case for a new trial, Chief Justice Sharkey,

speaking of the statutory provisions, said: "These "restrictions and requisites have been imposed for "wise purposes. They are safeguards thrown "around the liberty of the citizens. They consti- "tute an important part of the right of trial by "jury."

McQuillen *v.* State (*supra*).

In CLARE *v.* THE STATE (*supra*) the indictment was for murder, and the prisoner pleaded in abatement that the Grand Jury had beea illegally drawn.

1st. That the indictment was not found by the grand inquest of Baltimore City.

2d. That by the Code of Public Laws of the State of Maryland it is provided that the Judge of the Superior Court and others therein named shall meet at such place as they may appoint during the month of March, in each and every year, to select the names of seven hundred and fifty persons to serve on the grand and petit juries of the city. That they did not, in the month of March, 1866, or at any other time, select the said number of persons qualified to serve as grand jurors at the May term, 1866, of the Criminal Court of Baltimore, being the term at which the indictment was found, and that there had never been any such appointment of jurors qualified under the laws of the State to serve as grand jurors for said Court at said term.

3d That by the 608th Section of the said Article, it was the duty of the Judge of the Superior Court to cause the names of the several panels to be drawn in the mode prescribed to be entered in five several books, and that the books shall be certified by the said judges and denominated the jury book, Balti-

more, one of which shall be deposited with the Sheriff, who shall summon 23 of the said persons to serve as grand jurors; that the Judge did not prepare the names nor certify the jury books, as required, before the commencement of the term at which the indictment was found.

4th. That the indictment was found by persons assuming to act as grand jurors, who were not qualified to act as such, in that their names had not been selected by the Judges, and were not entered in the order in which they were drawn, and in that the copy of the jury book required to be deposited with the Sheriff was not certified by the Judges as required by law in that they did not assemble ten days before the commencement of the May term.

5th. That four of the grand jurors were not duly and legally qualified to act as such, in that they had served within the period of two years from the time they assumed to act as such.

These various pleas were overruled and the prisoner pleaded not guilty. The trial proceeded and a verdict of guilty of murder in the first degree was rendered.

After reviewing the statutory requirements and holding that they were designed to avoid if possible, vices then existing in regard to the organization of juries for the City of Baltimore, and to accomplish a reform in that respect, the Court, speaking by Stuart, J., said:

> "The grave and responsible duties required "of the judges were, in fact, *attempted to be* "*discharged by one of the deputy clerks.* "The law never contemplated that juries to "determine life, liberty, reputation and "property should be thus selected, when it "had specially and emphatically devolved "the duty upon the judges. Not only was "there no meeting for consultation on the

" part of the judges for the selection of
" names of persons to compose the list, but
" no meeting afterwards to approve or reject
" what had been done by the subordinate
" official. When presented to each Judge
" separately, it was adopted without particu-
" lar examination. We cannot give our
" sanction to such a mistaken execution of
" this law; its chief provisions have been dis-
" regarded--indeed, virtually abrogated. It
" follows, from these fatal omissions, that
" the body of men assuming to act as a grand
" jury, and to find the indictment in this
" case, were not qualified to act as such, be-
" cause the mandates of the law had not been
" pursued in their selection. When these
" facts, complained of by the pleas of the
" prisoner and denied by the State, were
" found by the Court below, that Court
" should not have decided that they were
" mere informalities, but fatal defects, and
" quashed the indictment and caused the
" prisoner to be indicted *de novo*."

Clare *v.* The State (*supra*).

In BROWN *v.* COMMONWEALTH (*supra*) the defendant had been indicted for murder, and he challenged the array of jurors for the reason that the Sheriff and Jury Commissioners of Schuylkill County, at the time of the selecting and placing in the wheel of the names of the jurors, did not secure it in the manner required by law, the wheel being sealed with only one seal, whereas the statute required that it should be secured by sealing the same with their respective seals.

The Court held that the challenge was good and that the indictment should have been quashed.

Brown *v.* Commonwealth (*supra*).

In AVIRETT *v.* THE STATE (*supra*) the indictment was for libel, and among the pleas filed by the defendant was one presenting the question of the regularity of the drawing of the grand jury finding the indictment.

The Code of the State of Maryland provided that it should be the duty of the Circuit Courts for each of the counties in the presence of such practicing members of the bar as should think proper to attend, to proceed to select from the jury list last furnished by the Clerks of the County Commissioners and from the poll books of the several election districts, a panel consisting of the names of two hundred persons to be fairly and impartially selected by the Judge, with special reference to their intelligence, sobriety and integrity and without the least reference to their political opinions.

It was pleaded in abatement that the jurors drawn for the term at which the defendant was indicted, were not drawn as the statute required.

In support of this plea it appeared that the Judge drew the grand jury from a list previously made out by him from the names of persons that he knew, and from names that had been suggested to him by different persons in the different districts of the county, but was chiefly composed of the names of persons that had previously been in the books but had not been drawn out, and that some of the names had been suggested by different members of the bar; that no reference was made at that time to the poll-books or to the list mentioned by the Clerk of the County Commissioners, except to ascertain the correct spelling of one of the names and whether another person on the list was twenty-five years of age.

All of the names placed in the box appeared upon the poll-books of the several election districts of Alleghany County, but some of them did not ap-

pear upon the list of taxpayers filed by the Clerk of the County Commissioners.

The Court holding that the method of selecting the jury was not a substantial compliance with the provisions of the statute, speaking by Coleridge, J., observed that all questions touching the formation of juries must be examined by the Judge with very critical eyes, and expressed himself as follows:

> "This Court has said, in Green *v.* State, "59 Maryland, 123, that 'the general method "'prescribed for drawing jurors is manda- "'tory, and substantial compliance with "'the provisions thereof in respect to the "'selection and drawing of jurors is neces- "'sary to make the jury a legal one; and "'unless the selections are made by the "'Judge in the manner pointed out by the "'statute, exception at the proper time and "'in the proper way may be successfully "'taken to a jury improperly chosen and "'drawn; otherwise the statutory pro- "'visions would be wholly nugatory.' "Now, the statute unequivocally prescribes "that the two hundred names which are to "be placed in the box and from which the "names of the forty-eight persons who are "to form the grand and petit jurors are to "be drawn, shall, in the presence of such "members of the Bar as think fit to attend, "be selected by the Judge from the tax list "and the poll books. The persons who "shall make the selection is the Judge and "no one else; the selection is to be made "publicly in the presence of the members of "the Bar, if they attend after notice; and the "poll books and tax lists are the two ex- "clusive sources from which the Judge can "procure the names to be placed in the jury "box. The selection must be made by him

" with special reference to the intelligence,
" sobriety and integrity of the persons
" chosen. * * * It was the obvious design of
" the law to provide the most minute safe
" course for the selection of intelligent, dis-
" interested and upright jurors; but this
" salutary policy might be utterly frustrated
" if the Judge, instead of himself making
" the selections, merely adopted the lists
" privately furnished to him by persons who,
" without his knowledge, may be interested
" in securing the attendance of particular
" individuals to serve upon the jury. The
" names thus furnished by him may be
" names upon the poll books or tax list, but
" they are not names selected by him there-
" from. If he placed into the jury box
" the names thus given him, he accepts
" the selection of some one else. * * *
" Confessedly, the names were not
" taken from the tax list or the poll book,
" for these were referred to but twice, once
" to verify the spelling of a name and once to
" ascertain a person's age. That the names
" actually selected happened to be upon the
" poll books or the tax list was an accident.
" They were not taken from either; and if
" they were not taken from either at the
" time and in a manner designated by the
" law, the plain letter as well as the manifest
" design of the statute was clearly dis-
" regarded. If the practice pursued in this
" case were tolerated, it is not difficult to
" foretell its wide-spread and disastrous con-
" sequences; designing or interested parties
" or others at short notice might with ease
" impose upon a Judge by privately suggest-
" ing the names of persons unfit to be jurors;
" but what is still more to be dreaded, they

" might by the same means secure for their
" own sinister ends an absolute dominion and
" control over the jury. It would be a last-
" ing reproach to the administration of
" justice if the Court sanctioned any con-
" struction of this statute which would af-
" ford the slightest opportunity for the cun-
" ning, the crafty and the unscrupulous to
" secure the selection of a venal, a corrupt
" or pliable jury. And yet such a result is
" precisely the one that will come to pass—
" perhaps not immediately, but none the
" less inevitably unless the practice followed
" in this case is absolutely abandoned and
" discountenanced at once. If the selection
" of names be made privately when the law
" declares that they shall be made publicly;
" if they are made before the day designated
" for them to be made when the law requires
" them to be made on that day; and if they
" be made from sources not mentioned by
" the statute instead of from the two sub-
" stantially prescribed thereby; and a jury
" thus selected and drawn be held to be a
" legally constituted panel, then the most
" material provisions of the jury law will be
" swept away by sheer judicial legislation."

Airrett v. State (*supra*).

In STATE *v.* NEWHOUSE (*supra*), also an indictment for murder, one of the grounds for appeal was the alleged illegal organization of the grand jury.

The statute respecting the formation of grand juries provided that two jury commissioners were to select impartially from the citizens of the parish of Orleans, having the qualifications requisite to register as voters, the names of not less than five

hundred good and competent men, a list of whose names should be made out and returned, certified under their hands, to the Clerk of the Superior Criminal Court; each of the names on the list were to be written out by the Clerk, on a separate slip of paper, together with the place of residence of each person, and the slips of paper were to be placed in a box or wheel to be kept for that purpose by the Sheriff of the court. Ten days before the expiration of either month in which the court should hold its sessions, the two commissioners, together with the Sheriff, should proceed to draw from the box not less than forty eight names, and the persons whose names were so drawn were to constitute the petit jury for the month or session of the court succeeding such drawing. Before proceeding to trial, the accused challenged the array of petit jurors, and moved to quash the venire on various grounds, among which were:

1st. That the names from which the venire was drawn, and out of which the petit jury was composed, were not selected by the jury commissioners, but that a list of over two hundred names was furnished by one Adams to said commissioners and put into the wheel from which the venire was drawn.

2d. That in the said wheel at the time the jury were drawn, there were names of persons selected by James Lewis and Smallwood, as jury commissioners, at a time when said Lewis was not a jury commissioner, he having months before resigned his office and accepted that of police commissioner. The Court holding these objections to be good, said:

> " Both of these objections were, we think,
> " clearly shown to be true, in point of fact.
> " It seems that the commissioners, to lighten
> " their labors, asked Adams to furnish them

"a list of two or three hundred names for "the jury wheel, which he did. The com- "missioners, in their testimony, state that "they looked over and approved this list af- "ter Adams prepared it. The District Judge "was of opinion that this was a substantial "compliance with the statute, and that the "commissioners, by approving, made the "list their own selection. We do not think "so. To so hold would be equivalent to "affirming that the commissioners could "act by proxy or deputy in the per- "formance of their very important and "grave duties. Nothing in the statute justi- "fies such an inference. Much less could "their functions be performed by a person "like Mr. Adams, who was, as it were, a mere "bystander, under none of the obligations of "an official or even of an agent or proxy. It is "manifest that there would and could be no "security for the accused against packed "juries, if they be selected in this loose way. "The intent of the law was that two respect- "able and competent men should, under the "appointment of the Governor and under the "sanction of oath, select from all the voters "of the parish a list of persons to serve as "jurors; they should inspect and select from "the names of all the voters and not simply "inspect and approve what might be a cut "and dried list of two or three hundred "names. Such a system is too liable to "abuse to be tolerated by courts charged "with the rights and liberties of citizens."

State *v.* Newhouse, 29 La. Ann., 824.

These cases from which we have quoted, as well as the others referred to by us under this subdivis-

ion, we submit, are direct authority for holding that the indictment found in the Southern District of Georgia against these appellants was not found by a legally constituted grand jury, but by a body of men congregated in total disregard of the statutory provisions and invested with no authority to find indictments against persons accused of crime; that a finding by such a body is not the presentment or indictment provided for by the Fifth Article of Amendment to the Constitution of the United States; and that the removal of these appellants for trial upon such a finding would be without that due process of law guaranteed to every individual by the Constitution.

Sixth.—THE ALLEGED INDICTMENT IS ALSO INVALID BECAUSE IT PURPORTS ON ITS FACE TO HAVE BEEN DRAWN IN THE EASTERN DIVISION, WHEREAS, AS A MATTER OF FACT, IT WAS DRAWN AT THE CITY OF MACON IN THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA.

The statute creating the Eastern Division of the Southern District of Georgia provides:

> "Prosecutions for crimes or offenses here-
> "after committed in either of the subdivi-
> "sions shall be cognizable within such divi-
> "sion."

Judge Krekel, in U. S. *v.* BERRY, 24 F. R., 780, held that this language (or practically the same) requires all proceedings to punish for a crime committed in a division of a district to be had and conducted within the division where the offense is committed.

This decision is cited with approval by Judge Hanford in U. S. *v.* WAN LEE, 44 FED REP., 707.

The face of the indictment in this proceeding shows that it was drawn "FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT." This is held to

make the indictment void, as no matter where the jury is drawn, IT MUST BE FOR THE WHOLE DISTRICT AND NOT FOR THE DIVISION.

U. S. *v.* Dixon, 44 Fed Rep., 401.

While this case was not followed, but directly disapproved by Judge Hanford in the Wan Lee case (44 Fed. Rep., 707), so as to make the question yet unsettled, or rather to be determined by this Court, there is no authority against the decision of U. S. *v* BERRY (24 F. R., 780), approved by U. S. *v.* WAN LEE (44 F. R., 707), that all the proceedings must be in the division where the offense was committed.

What does the caption of this indictment show, and what is the uncontradicted proof, as to where the jury was drawn?

THE INDICTMENT.—"THE GRAND JURORS OF THE "UNITED STATES CHOSEN, SELECTED * * * IN "AND FOR THE EASTERN DIVISION," ETC

THE EVIDENCE.—ON THE 22D OF NOVEMBER, 1899, AT THE CITY OF MACON, IN THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA, JUDGE SPEER, ASSISTED BY THE UNITED STATES MARSHAL, DREW THE NAMES OF THE JURY FROM THE BOX BELONGING TO THE EASTERN DIVISION.

See testimony of Barnes, Record, p. 61, fol. 113.
See testimony, L. M. Erwin, Record, p. 72, fol. 133.
See Exhibits, Record p. 14, fol. 27.

Clearly this testimony shows that this Grand Jury was not drawn IN THE EASTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA.

There is nothing then before the District Court of Georgia which these appellants can be held to

answer, and their further detention is without authority of law and in violation of their constitutional right to be secure in their persons against unreasonable searches and seizures.

Point III.

The defendants have in no way waived their right to insist that before they shall be held to answer an infamous crime they must first have been indicted by a grand jury empaneled and sworn according to law.

This Court has never held, nor do we believe it ever will hold, that the objection that the mandatory provisions of the statute which perform a vital function in the empaneling of a grand jury have been disregarded or substantially departed from, can be waived.

On the contrary, it has ever been alert to assert the importance of an indictment by a legally drawn grand jury, in the trial of crimes and offenses involving life or infamous punishment. It is true this Court has said that where the objection relates to a mere irregularity which does not make the whole panel void or is not shown to have prejudiced the accused, it must be raised at the first opportunity or be deemed waived.

In UNITED STATES *v.* GALE (109 U. S., 65) objection was taken to the grand jury on the ground that four persons otherwise competent should have been excluded from the panel on the ground that they had voluntarily taken part in the rebellion and had given aid and comfort thereto, and that such acts

had disqualified them as grand jurors under Section 820 of the Revised Statutes.

The objection was not taken until after the defendant had pleaded to the indictment *and had been tried and found guilty.*

This Court held that the objection came too late; that the defendants should have either moved to quash the indictment or have pleaded in abatement if they had had no opportunity or did not see fit to challenge the array.

The opinion of the Court was written by Mr. Justice Bradley and he expressly stated that there were cases in which the objection to the grand jury might be taken at any time, as where THE WHOLE PROCEEDING OF FORMING THE PANEL IS VOID, as, for instance, where the jury was not a jury of the Court or term in which the indictment was found, or had been selected by persons having no authority whatever to select them, or where they had not been sworn or where some other fundamental requisite had not been complied with.

U. S. *v.* Gale (*supra*).

In AGNEW *v.* UNITED STATES (165 U. S., 36) it was set up as ground for abatement of the indictment that *after the original venire had been exhausted*, purporting to act under the provisions of Section 808, sixteen grand jurors were obtained in the following way:

The Court ordered a special venire to issue for ten grand jurors to be drawn according to law "to be taken from the County of Duval."

In drawing the ten grand jurors, the Clerk and the Marshal, if a name drawn from the box was of a person not from the County of Duval, laid it aside and continued drawing until ten names from the County of Duval were obtained.

The Court, on excusing three of the ten so drawn,

ordered four more names to be drawn to complete the panel and the same procedure was adopted in regard to these four, and the procedure continued until the Grand Jury was completed with persons from Duval County.

There was no question in that case as to the jury box having been legally made up, and, as said by Chief Justice Fuller, in his opinion, the jurors were all drawn from the body of the district as provided by Section 808.

It was held that this was at most an irregularity which did not relate to the competency of the individual jurors; that in such cases the defendant must take the first opportunity in his power to make objection, and if he lies by until after his case was to be brought before the Grand Jury, his exception may be too late, but if he has had no opportunity of objecting before bill found, then he might take advantage by motion to quash or by plea in abatement.

Agnew *v.* U. S. (*supra*).

Neither of these cases, we submit, bears upon the question in the case at bar.

HERE THE ILLEGALITY IS SUCH AS TO RENDER THE WHOLE PANEL VOID. It is not a mere irregularity, but goes to the competency of the Grand Jury finding the indictment.

This case is, we submit, directly in that class of cases where the objection may be taken at any time because the whole panel is void, and all proceedings by that body are *coram non judice*.

Neal *v.* Delaware, 103 U. S., 370.
U. S. *v.* Hammond, 2 Woods' Circuit Reports, 197.

Clare v. The State, 30 Md., 164.
Finley *v.* The State, 61 Ala., 201.
State *v.* Rockafellow, 6 N. J. Law, 405.
State *v.* Akum Griffice, 74 N. C., 316.
People *v.* Thurston, 5 Cal., 69.
Reich *v.* The State, 53 Ga., 73.

In CLARE V. THE STATE (*supra*) upon the question of waiver, the Court said:

"No grand jury could be lawfully assembled in the city of Baltimore except by virtue of this jury law. If its essential requirements have been disregarded in reference to the selection and summoning of the grand jury in question, that body had no authority to act as such, and any indictment found by them was void, and must be so regarded by the courts as if expressly so declared by statute. The legal result is the same. No body of men assembled without authority of law have the right to assemble to act as a grand jury. The current of authority in this country sustains this view. Although there are some decisions of respectable courts and *dicta* of eminent judges to the effect that the objection in question must be taken by challenge to the array or to the polls, yet the decided weight of authority in this country is that the objection, whether to individual jurors or to the constitution of the whole body, may be taken by plea in abatement or motion to quash after bill found and before plea to the merits. This position is also sustained by sound reason. To confine the right of objection to the qualification of the grand jury to challenge to the array would in practice render it utterly worthless. In many, perhaps in a majority of cases in

" our criminal practice the first notice that a
" party has of an accusation against him,
" is a bench warrant or capias issued
" upon a presentment or indictmant. Where
" parties are under arrest they are
" not brought into court when the grand
" jury are empanelled and sworn, and often
" have not the opportunity to make the
" challenge, either to the body or individual
" members. No list of those who are to
" compose the grand inquest is ever fur-
" nished them, and most generally they have
" no means of knowledge upon the subject.
" To a party thus situated it would be but a
" mockery of law and justice to compel him
" to such defense before indictment found
" or to be considered as forever waiving the
" objection to the competency of the body
" alone authorized to take the initial step
" towards his lawful conviction. It is indis-
" pensable in a criminal trial that the grand
" inquest required to find the indictment
" should be constituted of 'good and lawful
" men,' and if the body, or any part of it,
" lie under substantial disqualification, they
" may be challenged by the prisoner before
" the bill is presented, or after the finding,
" the prisoner may plead the objection in
" abatement thereof. We fully concur in
" the remarks of Judge Hitchcock, in his
" dissenting decision in Boyngton *v.* State,
" 2 Porter, 143, which was subsequently
" followed in the Alabama decisions over-
" ruling the opinion of the majority in that
" case. 'What principle of public policy
" can be more sacred than that the sources
" of justice should be pure and wherein is the
" inconvenience greater after bill found than
" before? A bill is found to-day, the de-

"fendant put on trial to-morrow. He can "allege nothing against the Grand Jury when "the next entry on the minutes may be an "order discharging the same jury at the "suggestion of any idle by-stander against "whom no charge is made. Ought not the "Court rather to say that indictments found "by persons not good and lawful men shall "be revoked, annulled and holden for none "forever. If I am to be put on trial for my "life, let my accuser at least be *boni et* "*legales homines.* * * * Under any gov- "ernment of law the trial of persons accused "of crime from its commencement to the "conclusion should be scrupulously con- "ducted according to the requirements of "the law. Not only the sacred administra- "tion of public and private justice, but the "good order of the community, the security "and protection of life, liberty and property "cannot be preserved, except by the inflexi- "ble maintenance and impartial enforce "ment of the statutory as well as the fun- "damental laws of the land. Where the "substantial provisions of the law have not "been regarded, and a party has been con- "victed in violation thereof, and without "their sanction, such party is entitled to "a reversal, if legal steps in due time are "taken to obtain redress."

Clarke *v.* State, 30 Md., 164.

And in FINLEY *v.* THE STATE (*supra*) the same view was expressed.

The Court said:

"An accusation of a criminal offense, not "the finding and presentment of Grand "Jury, is not an indictment and confers on a

"court no jurisdiction to put the accused on "a trial before a petit jury. A verdict and "judgment pronounced on such an accusa- "tion are absolutely void. The Circuit Court "is a court of superior jurisdiction, and it "may be, if its records are silent, or there "are recitals as to the organization of "a grand jury, that the presumption of reg- "ularity and legality will be indulged in to "support its judgments. But if its records "affirmatively disclose that a body of men "has been organized as a grand jury in vio- "lation of the statutes which prescribe the "mode of organizing such a jury, clothed "with the power of making presentments "which operate as criminal accusations "against the citizen, all the acts of that "body must be pronounced void; no solicita- "tion or laches on the part of the accused "can cure the illegality."

Finley *v.* State, 61 Ala., 201.

And in STATE *v.* ROCKAFELLOW (*supra*), upon the question of waiver, it was said:

"To contend that the accused person must "challenge the Grand Jury, when he is "called in court to be sworn, would be just "as much an innovation upon the act of "assembly. No mode is pointed out in "which the exception is to be taken, and we "consider that as the most correct mode "which, without being otherwise peculiarly "repugnant to the principles or policy of "the law, is ever calculated to give effect to "its human and salutary provisions. If the "mode by challenge is to be adopted it must "necessarily result that nine times out of "ten the benefit of a statute which provides

" a security for our lives, fortunes and repu-
" tation, by requiring that an indictment
" shall always be presented by jurors re-
" spectable for their character and stand-
" ing in society, shall be absolutely lost
" to the accused, without any actual
" neglect or fault of his own. It fre-
" quently occurs that the accused is altogether
" ignorant of the complaint when the Grand
" Jury is called; if he should chance to be
" present he cannot be assured that the
" prosecution will proceed; and at any rate
" it would be most extraordinary for him to
" make his challenges when there is no cer-
" tainty that his case will come under their
" cognizance. In most cases of a capital
" nature the person charged with the offense
" is actually in confinement and has not the
" physical capacity to make his challenges;
" he is never brought out and confronted
" with the Grand Jurors; nor is he served
" with a list of the persons who are to com-
" pose it; thus circumstanced it would be
" worse than a form; it would be a mockery
" of law and justice to compel him to avail
" himself of exceptions of this kind or to be
" considered as forever waiving every error
" in the proceedings of the Sheriff. It is
" surely the proper time and certainly early
" enough for the accused to except to the
" qualifications of the indictors after the bill
" had been presented against him. He then
" knows or can be informed who they are;
" he has time to ascertain their qualifications
" and his own means of proving the excep-
" tions which he may be advised to take; and
" we are unable to perceive any grounds

> " upon which he can be fairly deprived of
> " his plea to their incompetency."
>
> State *v.* Rockafellow, 6 N. J. Law, 405.

And in People *v.* Thurston (*supra*) the Court observed :

> " It is said that this objection comes too
> " late and ought to have been taken advant-
> " age of before the trial. It does not appear
> " upon the face of the indictment and it is
> " doubtful if it were known to the prisoner;
> " even if such was the fact I regard the in-
> " dictment thus found by an illegally con-
> " stituted body as worthless and all proceed-
> " ings based upon it void."
>
> People *v.* Thurston, 5 Cal., 69.

The views expressed in these cases are directly applicable to the case at bar. The body finding the alleged indictment was not a legal Grand Jury. It had no authority whatsoever to find any indictment. Its proceedings were *coram non judice*, and void.

But even if the proceedings were not void, the petition shows that these appellants have raised the objection at the first opportunity.

They were not in the State of Georgia when the alleged indictment was found, nor were they informed that any indictment against them was contemplated.

The first notification they had was the issuing of a warrant for their arrest in the Southern District of New York, to be held to await a warrant of removal.

It was in the removal proceedings that objection was taken by them to the illegality in the formation of the Grand Jury.

Nor can the trick resorted to by the United States Attorney in notifying their attorney in the removal proceedings to produce them for the purpose of pleading to the indictment and of raising any objections they might have to the Grand Jury be successful.

If these appellants had allowed themselves to be inveigled into the State of Georgia, it can be affirmed with the utmost confidence, that they would immediately have been arrested, and held within that jurisdiction.

But because they did not see fit to thus surrender themselves, the District Attorney caused his notice to be spread upon the records of the District Court by order of District Judge Speer. That notice is, we believe, to be urged, if these appellants are removed to the State of Georgia for trial, as ground for holding that they have waived their right to object to the illegality of the finding of the indictment.

Such a contention is utterly without merit. The proceedings for removal were commenced prior to these appellants being called upon to plead. It was in such proceedings that objection was made to the Grand Jury. Then the first opportunity was presented to the appellants to question the legality of the body finding the indictment, and they promptly availed themselves of it.

We respectfully submit that the facts and circumstances in the case at bar prevent the finding of waiver by the appellants even if they could waive the defects alleged.

Then, too, even if it were necessary to show prejudice from the illegal manner in which the grand jury was drawn, such fact, we submit, sufficiently appears from the record.

In the letter written by District Attorney Erwin to Judge Speer he calls attention to the fact that

the "grand jury will be needed to pass upon cer-
" tain cases, the most important of which involve
" matters touching frauds alleged to have been
" committed in river and harbor improvements
" carried on by the Government *in and about the*
" *cities of Savannah and Brunswick*, and which re-
" ceived much discussion and publicity AMONG THE
" PEOPLE IN THE COUNTIES IN WHICH THESE CITIES
" ARE SITUATED."

See Letter, Record, p. 96, fol. 179.

What was the motive of the District-Attorney in seeking to exclude jurors from Chatham and Glynn counties? Did he, as prosecuting officer, seek to exclude grand jurors likely to return an indictment, or those not likely to do so? Is it not a fair inference from his action that in his opinion the citizens of Savannah and Brunswick, knowing of the benefits to their cities which had been derived from the improvement of Savannah Harbor and Cumberland Sound, and of the manner in which the work had been done, were favorable to these appellants, and would be more likely to refuse than to find an indictment against them?

If a prosecuting attorney can secure an indictment by the disqualification and exclusion of more than half the number of names in the jury box on account of their supposed favorable attitude to the accused, can he not by the exclusion of three-fourths or nine tenths, or in fact, by confining the panel to a picked few, upon whom he can rely, secure the finding of any indictment which he may place before them?

Of course, these may be extreme views, but if the practice resorted to be overlooked it might lead to the most gross abuses, and abrogate entirely the safeguards of personal liberty, to protect and pre-

serve which the statutory enactments were designed.

We insist that the defects complained of were not irregularities but illegalities affecting the whole panel; but even if they be considered mere irregularities, the record in this proceeding shows prejudice to these appellants by the course adopted.

Point IV.

The question of the legality of the Grand Jury should be decided by this Court in this proceeding, and not left to be decided by the District Court of Georgia upon the trial.

Judge Brown, in the removal proceedings, seems to have been impressed with the strength of the appellants' contention respecting the illegality of the grand jury, but he refused to decide the question for two reasons.

1st. "Because the question is a new one arising "upon the construction and effect of an important "statute and not decided or in any way passed "upon by the Supreme Court as the ultimate au- "thority. Any decision in defendants' favor in "this proceeding cannot be reviewed or corrected "if erroneous, in the ordinary mode of review; and "justice would, by such an erroneous ruling, be "defeated; whereas by leaving the question for the "Trial Court this objection will continue to be "equally available to the defendants there, and any "decision thereon, adverse to the defendant, if er- "roneous, can be corrected in the regular course of "appeal. It is only where there can be no reason-

" able doubt concerning the invalidity alleged that " removal should on such grounds be refused."

2d. Because there was, at least, some question whether the objection to the grand jury had not been waived.

See Opinion Brown, J , Record, pages 56–7.

The second objection stated by the learned Judge, we have already, we submit, sufficiently answered.

As to the first objection we need only say that it can have no force in this proceeding.

All of the evidence available has been produced, and is a part of the record now before the Court.

There is no dispute whatsoever in the facts.

We fail to see why the Judge presiding at the trial in the District Court of Georgia is more competent to decide the question presented than the Judge of the District Court directing the removal, or the Judge of the Circuit Court denying the application in this proceeding.

In the MATTER OF TERRELL (51 Fed. Rep., 213), Judge Lacombe expressed the view that if questions are presented of such a character that the opinion of an appellate court should be obtained, a proceeding by habeas corpus is the appropriate way in which to raise them " for a decision here adverse " to the Government is reviewable by appeal; but a " similar decision on the trial is final, as the Govern- " ment cannot appeal from a criminal judgment."

In re Terrell, 51 Fed. Rep., 213.

But, in any event, the question is now properly before this Court as the ultimate authority and should be decided.

Pullman Palace Car Co. *v.* Central Transportation Co., 171 U. S., 138.

Moreover, the gravity of the questions presented and the importance of a decision by this Court to the appellants cannot be over estimated.

It is entirely unnecessary to call attention to the functions of a Grand Jury and its value in the cause of personal liberty.

To quote Mr. Justice Field, its institution in this country "is designed as a means of not only bring-"ing to trial persons accused of offenses on just "grounds, BUT ALSO AS A MEANS OF PROTECTING "THE CITIZENS AGAINST UNFOUNDED ACCUSATION "WHETHER IT COMES FROM OR BE PROMPTED BY PAR-"TISAN PASSION OR PRIVATE ENMITY."

And he quotes with approval the words of a distinguished Judge to the effect that "into every "country of the globe in which the Anglo-Saxon "race have formed settlements they have carried "with them this time-honored institution, ever re-"garding it with the deepest veneration and con-"necting its perpetuity with that of civil liberty."

Mr. Justice Field in 2 Sawyer, 228–229.

Mr. Justice Wilson, formerly of this Court, gave expression to the view that "Among all the plans "and establishments which have been devised for "securing the wise and uniform execution of the "criminal laws, the institution of grand juries "holds the most distinguished place. This institu-"tion is at least in the present times the peculiar "boast of the common law. * * * In the annals "of the world there is not found another institu-"tion so well adapted for avoiding all the incon-"veniences and abuses which would otherwise "arise from malice, from rigor, from negligence, "or from partiality in the prosecution of crimes" (3 Wilson's Works, pages 363–364).

The liberties of citizens, says Blackstone, "cannot

"but subsist so long as this palladium remains "sacred and inviolate."

For a most impressive argument upon the value of an indictment by a grand jury to the liberty of the citizen we refer to the opinion of Mr. Justice Harlan in the case of HURTADO *v.* CALIFORNIA (110 U. S., 225), from which the extracts above quoted have been taken.

Nothing further than was there said need be or can be advanced to show the importance and value of a valid indictment found by a jury empanelled according to the forms of law. Of this valuable right it is sought to deprive these appellants.

The United States Attorney for the Southern District of Georgia has already attempted to lay a foundation for claiming a waiver by them of the questions here presented, by formulating and sending to their attorney in the removal proceedings, a notice requiring their appearance to plead to the indictment in the Southern District of Georgia, while the proceedings for their removal were pending in the Southern District of New York.

See Letter, Record, page 156.

This letter, together with the answer sent by Mr. Rose, was by order of Judge Speer directed to be placed on file as a part of the record of the proceedings in that case.

See Order, page 155, folio 279.

It is not necessary to impugn the action of either the District Judge or the District Attorney. Such a proceeding, however, we believe to be without precedent and entirely unjustifiable, and at least shows a disposition on the part of the District Attorney to evade meeting the questions here pre-

sented on the merits by claiming a waiver of them by the appellants.

If his contention on the question of waiver be upheld, then these appellants will be put to the hazard and expense of a trial before a court in a foreign state upon an invalid indictment without the question of the legality of the finding of the indictment having been passed upon by this Court as the ultimate authority.

BESIDES THE DISTRICT JUDGE WILL BE COMPELLED TO PASS UPON THE VALIDITY OF HIS OWN ACTS, WHICH FORM A MATERIAL PART OF THE ILLEGALITIES IN THE FORMATION AND DRAWING OF THE GRAND JURY.

If such a proceeding be authorized then the constitutional guarantees against being deprived of their liberty without due process of law, and to be protected in their persons against unreasonable seizures would be of little avail to these appellants.

The books are full of cases where the prisoner has been discharged upon habeas corpus BEFORE TRIAL, where it is made to appear that he cannot lawfully be tried for the offense with which he is charged.

Thomas *v.* Loney, 134 U. S., 372.
Cunningham *v.* Naegle, 135 U. S., 1.
Boske *v.* Comingore, 177 U. S., 459.
People *v.* Brady, 56 N. Y., 182.
In re Greene, 52 Fed. Rep., 104.

And in proceedings for removal, under Section 1014, this Court expressly held that it is the duty of the Court, upon habeas corpus, not only to inquire into the question of jurisdiction, but also into the sufficiency of the indictment.

Horner *v.* U. S., 143 U. S., 207.

See also

In re Greene, 52 Fed. Rep., 104.

Where the prisoner is held under State authority a different rule prevails, and in the absence of special circumstances, the Federal courts it seems will not interfere until after trial in the State courts.

Ex parte Royall, 117 U. S., 241.

Here there is no question of State authority, but one solely of Federal jurisdiction.

Every consideration requires a decision of the questions presented by this Court in this proceeding.

In no other way can these appellants receive the summary relief directed by the Habeas Corpus Act, requiring that a person deprived of his liberty, in contravention of the Constitution or laws of the United States, shall "FORTHWITH" be discharged and set at liberty (Act of February 5, 1867; 14 Stat., 385).

Point V.

The constitutional rights of the appellants have also been violated, because the warrant of removal was issued without a finding of probable cause by the officer whose duty it was to find the same.

First.—The Constitution expressly provides that no warrant shall issue but upon probable cause.

See Constitution, Article 4.

In the case at bar on the first hearing before Commissioner Shields the Government offered in evidence as proof of probable cause simply the indictment found by the alleged grand jury in the Southern District of Georgia.

The only other proof offered was as to the identity of these appellants with the persons charged in the indictment.

All testimony offered by them tending to show that there was no probable cause was rejected.

A finding of probable cause was made by the Commissioner, and a motion was made for the issuance of a warrant of removal.

This motion came on for a hearing before District Judge Addison Brown, who reviewed the various decisions on the question of removal, and the procedure applicable thereto, and held that under the decision *In re* DANA (68 Fed. Rep., 886), these appellants were entitled to introduce evidence tending to show want of probable cause.

See Opinion Brown, J., Record, pp. 45–47

The order denying the motion directed that "The "matter be sent back to the Commissioner FOR "FURTHER COMPETENT TESTIMONY by either side in "accordance with the opinion rendered herein."

See Order, Record, page 55, folio 101.

Pursuant to this order further testimony was taken before Commissioner Shields, and he reported it back, together with a finding that, in his judgment, probable cause for removal had been shown.

See Record, pages 3 and 4, folios 7 and 8.

Upon this testimony and finding a second application was made to the District Judge for a warrant, and it was granted, but without any finding by him of probable cause.

It was expressly contended by these appellants that the finding of the Commissioner under the order sending the case back simply for further testi-

mony, was without force and effect, and that the District Judge must himself pass upon the question of probable cause.

In refusing to decide the question of probable cause independent of the finding by the Commissioner, Judge Brown said:

> "As respects the finding of probable cause, "I have carefully considered the very ex- "tended briefs and arguments of counsel, "and have examined the voluminous evi- "dence with a view to ascertain whether "there was competent evidence before the "Commissioner sufficient in itself to sustain "his finding of probable cause.
>
> "Under the rule above stated, it is not for "the Judge on an application for removal to "compare different parts of the testimony "in order to determine their relative weight, "or to substitute his own judgment for that "of the Commissioner, even though it "might on the whole evidence be different.
>
> "By this, however, I do not mean to be "understood as expressing any opinion what- "soever on the merits of the case. THE DE- "FENDANTS HAVE GIVEN A GREAT DEAL OF "EVIDENCE TENDING TO SHOW THAT THEIR "CONTRACTS WERE FAIRLY OBTAINED, THEIR "WORK WELL AND HONESTLY DONE, AND "THAT THE GOVERNMENT HAS NOT BEEN DE- "FRAUDED A DOLLAR.
>
> "The Government, on the other hand, has "given evidence tending to a contrary con- "clusion, and it has shown beyond question "that Captain Carter, the employee of the "Government and the engineer in immediate "charge of the work on the Government's "behalf and for several years immediately "preceding the contracts referred to in the

"indictment, had received from the con-
"tractors continuously through his father-
"in-law, in many divisions of profits, one-
"third of the final net proceeds of each
"contract remaining for division among
"the chief contractors; and that this one-
"third amounted in the aggregate to over
"$700,000."

See Opinion Brown, J., Record, page 59, folio 109.

It is thus evident that there has been no finding of probable cause by Judge Brown.

The District Judge, by his own order, and not the Commissioner, became the Committing Magistrate, and it was his duty to pass upon the question of probable cause and to determine for himself whether the appellants should be further held or removed.

Supervisory, and not appellate power was given by the statute to the District Judge over the action of the committing magistrate.

He could refuse to remove on the finding by the Commissioner, or he could order further testimony to be taken so as to satisfy HIMSELF of the existence of probable cause. After the taking of further evidence, it was his judgment and not that of the Commissioner which was to be exercised in weighing the evidence on the question of probable cause. This seems to be the clear meaning of the removal statute as construed by the cases to which we have referred under Point I of this Brief.

Lastly.

The indictment charging the offense for trial upon which it is sought to remove these appellants does not sufficiently charge any offense against the United States.

First.—This Court has expressly held that upon habeas corpus to be discharged from imprisonment under Section 1014, the Court should inquire into the sufficiency of the indictment charging the offense.

Horner *v.* The United States, 143 U. S., 207.

In that case this Court specifically passed upon the question of the sufficiency of the indictment, upon appeal from an order of the Circuit Court, dismissing a writ of habeas corpus and remanding the accused.

In removal proceedings in the State of New York the duty is the more imperative because under the "usual mode of process against offenders" in that State the prisoner is entitled to full opportunity of questioning the indictment and of showing lack of probable cause.

In re Dana, 68 Fed. Rep., 886.

Second.—THE INDICTMENT IN THE CASE AT BAR DOES NOT SUFFICIENTLY CHARGE ANY OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

1st. The indictment consists of ten counts and purports to have been found under Sections 5438 and 5440 of the Revised Statutes of the United States.

Counts one to eight, inclusive, are under Section 5440. Counts nine and ten are under Section 5438.

Section 5440 provides:

> "That if two or more persons conspire "* * * to defraud the United States in any "manner or for any purpose, and one or "more of such parties DOES ANY OVERT ACT "to effect the object of the conspiracy," all the parties shall be liable to a penalty, etc.

Section 5438 provides:

> "That every persons who presents, or "causes to be presented, for payment and "approval to any person in the military "service of the United States any claim "upon the Government, knowing such "claim to be false, fictitious or fraudulent, "or who enters into any agreement, com-"bination or conspiracy to defraud the Gov-"ernment of the United States, by obtain-"ing, or aiding to obtain, the payment or "allowance of ANY FALSE OR FRAUDULENT "CLAIM," shall be punished as therein provided.

2d. The first count, if it charges anything, charges two offences. Its allegations are that the defendants, naming them, did, on the first day of January, 1897, enter into a conspiracy to defraud the United States by means of another conspiracy which the same parties theretofore and about 1891 had entered into, and which last named fraudulent scheme or conspiracy was put into operation in 1891, and continued in operation down to October, 1899. The indictment does not call the second scheme a conspiracy, but a "fraudulent scheme."

It is stated by way of recital that Carter was an officer of the United States Army in the Corps of

Engineers and in charge of River and Harbor improvements in the Savannah District, and was vested with sundry powers, duties and discretion; that he had the power, duty and discretion of proposing projects for improvements; of devising and drafting specifications for contracts; of drafting and suggesting forms for advertisement, of giving notice of bids for work, of fixing the time the advertisement should be published, of suggesting or causing to be fixed the time within which the successful bidder must commence work; of giving out information in regard to contracts to be let; of receiving proposals for, and recommending the awarding of contracts; of approving or rejecting the bonds required in superintending the work and approving or rejecting the work done according as the same was in accordance with the requirements of the contract or not, and of suggesting or approving modifications of the contracts; of approving or rejecting accounts for work done according as said accounts shall be fair and honest or false and fraudulent, and when in funds, of paying or refusing to pay the contractors for work done.

The count then continues that the scheme contemplated that Carter "should so fraudulently exercise" the powers of his office and the discretion vested in him that competition "IN BIDDING FOR SUCH CONTRACTS TO BE LET" should be shut off, and the defendants would be the only real competitors—that all contracts would be obtained by them or some other person or corporation for their benefit; that the work put out on contracts would be let at high and exorbitant cost to the United States; that the specifications for the work should be so devised and drafted as to allow changes of types of material so as to inure to the benefit of the contractors and possible loss to the United States—that the description of material required should be

vague, and of such a character that no one prior to the time of awarding the contract could know what was really required to be done under it; that the quantities of work and character of material could be changed by him under the specifications so drawn so as to insure the contractors the greatest profit and the least cost, and so that others not parties to this scheme who should be the lowest bidders might be oppressed by Carter's construction of the contracts, and that he knowingly should approve of the fraudulent accounts, and should pay such accounts and divide the proceeds, and should do anything else necessary to carry out the scheme.

The indictment then alleges that on the first day of January, 1897, these defendants were proceeding with the construction of the works at Savannah Harbor, under the contract that had been entered into on the 8th of October, 1896, by the Atlantic Contracting Company, which contracts had been fraudulently obtained by means of the scheme set out and that ON THAT DATE the defendants conspired to defraud the United States out of large sums of money, by means of APPLYING that scheme to the execution and completion of the work under the said contracts.

IT WILL BE NOTICED THAT THERE IS NO ALLEGATION THAT THE UNITED STATES WAS DEFRAUDED. Nor is there in this count, or, indeed, in the whole indictment, a single allegation of fact, showing that any act was done, which in this count is charged to have been agreed to be done. It is not alleged that the work was let at high and exorbitant figures. The contracts themselves are not set out so that it could be seen what were the contract prices, and then an allegation as to what was fair and reasonable. There is no allegation that there was, in fact, any change of type of material, by which there was benefit to the contractors, or loss to the United States. No act, or fact, is alleged, showing that

competition was shut off, that bids were unfair; or that any money, the proceeds of the payment of these accounts, was ever divided.

The second to fifth counts contain only charges of acts done to effect the conspiracy set forth in the first count. If the first count is insufficient, then the counts two to five must fall with it, *because they all depend upon and relate to the first count.*

The sixth count alleges that on the first of January, 1897, Carter, with the other defendants, conspired to defraud the United States of large sums of money by means, substantially as follows:

That Carter should fraudulently exercise his powers so that competition provided by law in bidding FOR CONTRACTS TO BE LET should be cut off, and that all contracts let *should be obtained by the conspiritors* at the highest cost to the United States. That Carter would devise and suggest projects for improvements and draft specifications for *contracts to be let*, which contracts *should be obtained* by the conspirators. That large amounts of useless work should be undertaken and done under *such* contracts (that is, contracts to be let), and that in *such* contracts he would exercise his powers in the approval and acceptance of work done under *such* contracts that said contractors would receive large amounts as payment for poor material put in the work under *such* contracts.

This count, like count one, does not allege any act done to effect the object of the conspiracy.

NOW, AS A MATTER OF FACT, NO CONTRACTS WERE LET AFTER THE FIRST OF JANUARY, 1897, IN THE SAVANNAH DISTRICT BY CARTER TO THESE ALLEGED CO-CONSPIRATORS, AND THE ONLY CONTRACT IN FORCE ON THAT DATE WAS THE CONTRACT MADE PRIOR TO THAT DATE, NAMELY, OCTOBER 8TH, 1896, AND NO SUBSEQUENT CONTRACT IS ALLEGED.

The overt acts charged by counts six and seven

both on their face relate to the contract of October 8th, 1896, and not to contracts to be let on January first, 1897, or thereafter, and therefore they cannot be held to charge an act done to effect the conspiracy alleged in the sixth count.

Counts nine and ten allege a conspiracy to defraud the United States by the payment and allowance of a false claim. This claim was for work done in certain specified months under the contract of October 8th, 1896. The time of the conspiracy in these counts is alleged as the first of July, 1897, that being the time when it was claimed these false accounts were presented.

3d. COUNTS TWO TO EIGHT INCLUSIVE WERE HELD BY DISTRICT JUDGE BROWN ON THE FIRST APPLICATION FOR REMOVAL TO BE WHOLLY INSUFFICIENT AND BAD.

He said:

> " The overt act charged in the second count " is irrelevant, since it does not appear to be " in any way connected with the conspiracy al- " leged nor within any one of the means or " devices set forth in the conspiracy count. " The overt acts charged in counts 3, 4 and 5 " are the presentment of alleged ' fraudulent " claims ' to Captain Carter of the Corps of " Engineers, WITHOUT ANY STATEMENT HOW " OR WHEREIN THEY WERE FRAUDULENT. The " items of the claims are given, dated July 1, " 1897, apparently verbatim, for work and " material furnished under the contract of " October 8, 1896. It would be naturally in- " ferred that the charge intended was that " these bills were in some way false and not " according to the contract; that is, that the " work done and the materials supplied were " less than was claimed or that they were of " inferior quality, or in some way different

" from the contract, or that the price was in-
" correct.

" BUT THERE IS NO SUCH AVERMENT AS RE-
" SPECTS ANY OF THE BILLS REFERRED TO IN ANY
" OF THE COUNTS; NOR IS IT STATED THAT ANY
" ONE OF THEM IS FALSE, WHILE FROM OTHER
" PASSAGES IN THE INDICTMENT, AS WELL AS
" FROM THE OBSERVATIONS OF COUNSEL IN THE
" STENOGRAPHER'S REPORT OF THE PROCEED-
" INGS, IT WOULD SEEM THAT THE SUPPOSED
" FRAUDULENT CHARACTER OF THE BILLS WAS
" NOT FOUNDED UPON ANYTHING INCORRECT IN
" THEM OR IN THE WORK, BUT UPON THE AL-
" LEGED FRAUDULENT DEVICES CONTEMPLATED
" IN THE PREPARATION AND LETTING OF THE
" CONTRACTS THEMSELVES, NO SINGLE ONE OF
" WHICH DEVICES IS, HOWEVER, DEFINITELY
" ALLEGED TO HAVE BEEN REALLY EMPLOYED.
" *Such averments not only do not reasonably*
" *apprise the defendants of the nature of the*
" *charges they must meet, but are calculated*
" *to mislead them.* This applies to all the
" counts except the second. The conspiracy
" charged in the sixth count relates wholly
" to future contracts to be let thereafter, *i. e.*,
" after January 1, 1897, while the overt acts
" stated in counts seven and eight relate
" wholly to the prior contracts of October 8,
" 1896. On this additional ground, counts 6, 7
" and 8 would seem to be necessarily bad."

See Opinion Judge Brown, Record, pp. 49–52.

This leaves for consideration the sufficiency of counts 1, 9 and 10.

A. AS TO THE FIRST COUNT:

The first count, if it charges anything, charges

two things: First, a conspiracy in 1891 and another in 1897. This alone would make that count void for duplicity.

Who can tell from the charge in this indictment what means the defendants were charged with using or intending to use in their conspiracy to defraud the United States? It charges that the said "fraudulent scheme" contemplated that these appellants and the other persons named as defendants in the indictment "WOULD USE SOME ONE OR MORE "OR ALL SAID MEANS AND DEVICES AND SUCH OTHER "AND ADDITIONAL DEVICES AS MIGHT BECOME NECES-"SARY FOR THE ACCOMPLISHMENT OF THE GENERLL "FRAUDULENT DESIGN OF THE SCHEME HEREINBE "FORE SET FORTH."

See Record, p. 18, fol. 35.

How was it possible to have made an agreement on the first of January, 1897, that Carter should "so fraudulently exercise the said powers of his "office and the said discretion so invested in him "that competition in the bidding for said contracts "to be let for the United States through him "should be cut off," with reference to the contracts of October 8th, 1896? On the 1st of January, 1897, all bids for the contracts of October 8th, 1896, had been offered. There was no more bidding on those contracts to be done. Hence it was impossible to apply this fraudulent scheme, on January 1st, 1897, to the contract of Octobder 8, 1896, so that these appellants, or some one for their benefit, "would be the "only real bidders for said contract in said district, "and that all contracts which were from time to "time let for the improvement of rivers and har-"bors in the Savannah district would be obtained "by one or the other of said bidders." Nor was it possible that, on January 1st, 1897, the fraudulent

scheme that " the said works in said district, to " be done by the United States on contracts, would " be let at high and exorbitant cost to the United " States of America," could be applied to the contracts of 1896.

The specifications for the contracts of that date had already been drawn, adopted and acted upon, and yet, under this indictment, it is charged that these defendants, on the 1st of January, 1897, agreed that Carter, as engineer officer, SHOULD " so devise and draft the specifications " as to permit the United States to be defrauded. It is unnecessary to further analyze the averments. Clearly every act that was required to be done prior to the 1st of January, 1897, could not form part of the scheme or conspiracy, on that date, to apply those acts to the contract of 1896.

To quote Judge Brown:

> " But of the fifteen or twenty devices, " which it is alleged that scheme 'contem- " templated,' three-fourths relate to the " terms, specifications and letting out of the " contracts themselves, so that most of the " scheme could not possibly be 'applied' to a " conspiracy formed on January 1st, 1897, " several months after the contracts were let " out. Of the remaining means or devices, " what ones are meant to be charged is left " wholly undefined.
>
> " This is all the more vague and uncertain, " since even the original fraudulent scheme " itself only alleged to have contemplated " that the conspirators would use some one or " more or all of said means and devices, and " such additional devices as might become " necessary."
>
> Opinion Brown, J., Record, p. 51, fol. 92.

What information is contained in the statement that the defendants intended or contemplated applying to the conspiracy "SUCH OTHER "AND ADDITIONAL DEVICES AS MIGHT BECOME "NECESSARY FOR THE ACCOMPLISHMENT OF THE "GENERAL FRAUDULENT DESIGN?" Can such an averment be held sufficiently to describe the act so as to apprise the defendant of the act intended to be given in evidence as tending to show that the unlawful scheme was put into operation? What words could the pleader have used more indefinite, uncertain and hidden? Who is to determine what "OTHER AND ADDITIONAL DEVICES" might be used, and who is to say which of those "MIGHT BECOME NECESSARY?"

We respectfully insist that this count of the indictment is wholly uncertain and indefinite as well as void for duplicity. In fact, it violates every principle of good pleading.

Blitz *v.* U. S., 153 U. S., 315.
Evans *v.* U. S., 153 U. S., 584.
Pettibone *v.* U. S., 148 U. S., 197.
U. S. *v.* Hess, 124 U. S., 483.
U. S. *v.* Britton, 108 U. S., 189.
U. S. *v.* Cruikshanks, 92 U. S., 558.
Lambert *v.* People, 9 Cowan, 578.
Commonwealth *v.* Hunt, 4 Metcalf, 111.
People *v.* Brady, 56 N. Y., 182.

It would seem that the objections urged to the sufficiency of this count must prevail.

B. AS TO COUNTS NINE AND TEN.

These counts allege that the defendants conspired TO DEFRAUD the United States by obtaining the allowances and payment of fraudulent claims. The alleged fraudulent claim is described as a claim for

labor and material "furnished by the Atlantic "Contracting Company * * * under a contract "theretofore entered into on the 8th of October, "1896, for improving Cumberland Sound, within "the State of Georgia, and which contract had "been entered into between the Atlantic Contract- "ing Company and the said Oberlin M. Carter," and "was for the sum of $345,000 for work, labor "and supplies claimed to have been furnished to "the United States by the said Atlantic Contract- "ing Company, for said work, at Cumberland "Sound," during seven months.

As the overt act done pursuant to the conspiracy alleged, a copy of the account for the month of December, 1896, is set out.

Neither in the part of the count that charges the conspiracy nor in the part charging the overt act is there one solitary fact averred showing that the account presented was false or fraudulent in any particular.

It is not stated that the contract referred to was a fraudulent one, or that the work, labor and supplies had not been furnished. Nor is it alleged that the prices in the bill set out are not the prices agreed upon and contracted for, nor that the material is not the material agreed upon, nor that the quantities therein stated are not the actual quanti ties put in.

For aught that appears, the contract was a valid one, the materials were actually furnished, and the prices were correct.

The gist of the offense, under Section 5438, is conspiring TO DEFRAUD the United States.

YET THERE IS NO AVERMENT THAT THE UNITED STATES HAS BEEN DEFRAUDED OF A SINGLE DOLLAR.

The argument made as to the ninth count applies equally to the tenth. The only difference between the two is that the ninth relates to the contract for

work at Cumberland Sound, while the claim alleged in the tenth count relates to work at Savannah. Referring to the averments of the indictment Judge Brown says:

> "The mere statement of the presentment
> "of 'fraudulent claims' without any indica-
> "tion how or wherein they were fraudulent,
> "which is the basis of all the counts, except
> "the second, is not a proper or sufficient
> "statement of any facts or circumstances
> "on which a judicial judgment of probable
> "cause can be based; it would not be suf-
> "ficient for an arrest, even in a petty civil
> "case. There is no allegation anywhere in
> "the indictment that the work and materials
> "supplied and the bills presented were not
> "strictly according to contract, that the
> "prices claimed or allowed were exorbitant,
> "that improper work was passed or improper
> "substitutions made, nor are any facts stated
> "showing actual fraud or that the Govern-
> "ment has been defrauded of a dollar."

Opinion Brown, J., Record, p. 53, fols. 96–97.

We, therefore, respectfully submit that as this Court has authority to pass upon the sufficiency of the indictment, and as it clearly appears that the indictment, as drawn, does not sufficiently charge any offense against the United States, on that ground, as well as the others, which we have already urged, these appellants should be discharged from further imprisonment.

In Conclusion.

The order denying the application for a writ of habeas corpus should be reversed, and the appellants should be discharged from imprisonment.

DAVID B. HILL,
L. LAFLIN KELLOGG,
ABRAM J. ROSE,
ALFRED C. PETTÉ,
Of Counsel for Appellants.

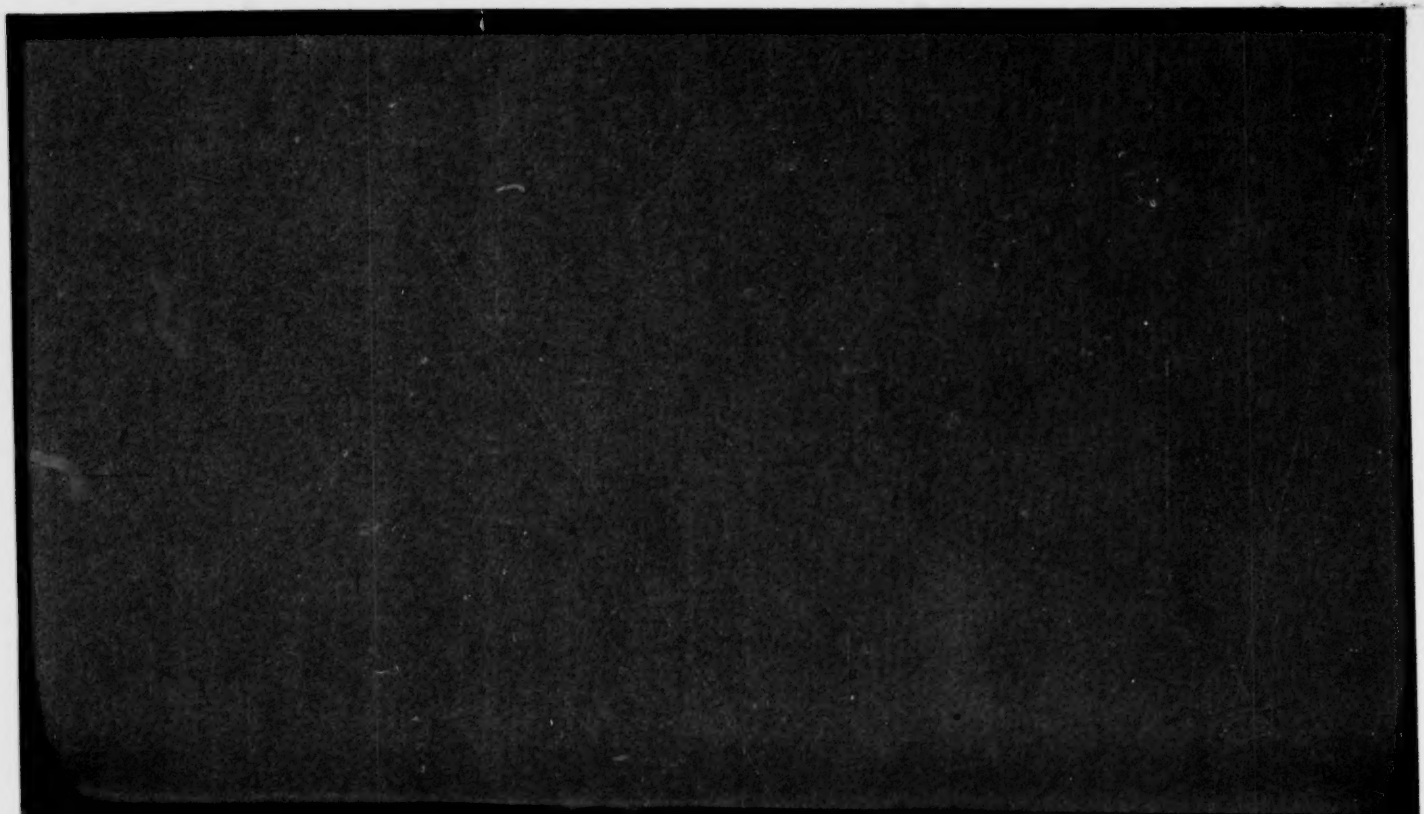
In the Supreme Court of the United States.

OCTOBER TERM, 1901.

BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. GAYNOR, appellants,
v.
WILLIAM HEISER, UNITED STATES MARSHAL in and for the southern district of New York.

No. 365.

MOTION TO ADVANCE.



In the Supreme Court of the United States.

OCTOBER TERM, 1901.

BENJAMIN D. GREENE, JOHN F. GAYNOR, William T. Gaynor, and Edward H. Gaynor, appellants,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL in and for the southern district of New York.
} No. 365.

MOTION TO ADVANCE.

The Solicitor-General moves the court to advance this case and assign it for argument on the earliest day convenient to the court during the present term for the following reasons:

1. On December 8, 1899, at the November term, 1899, of the United States district court for the eastern division of the southern district of Georgia, a true bill of indictment was found by the grand jury charging, in several counts, the defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and others, with conspiracy with Oberlin M. Carter, late captain of the United States Army and engineer officer in charge of the Savannah engineering district, to defraud the United States, and conspiracy to present false accounts in violation of sections 5440 and 5438 of the Revised Statutes.

2. On December 14, 1899, the defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, were arrested in the southern district of New York on a warrant issued by John H. Shields, United States commissioner, based upon an affidavit charging them with having committed, in the eastern division of the southern district of Georgia, the offense described in the indictment, to which affidavit a certified copy of the indictment was attached and referred to.

3. In due course the defendants were brought before the commissioner for a hearing, and the Government offered in evidence a duly certified copy of the indictment, together with the testimony of witnesses, fully identifying the defendants as being the persons so indicted and proving they had been in the eastern division of the southern district of Georgia during the period in which they were charged with having committed the offense described in the indictment. The defendants offered no testimony to show they were not the persons indicted, or to show they had not been in the eastern division of the southern district at the time the offense was charged to have been committed, but did consume several months in offering testimony tending to disprove their guilt of the charge set out in the indictment, all of which being directed solely to the question of guilt or innocence on the merits of the case was excluded by the commissioner as incompetent.

4. On February 20, 1900, the defendants having finally ceased to offer testimony, the commissioner duly made and entered his order on the complaint, finding

probable cause to believe the defendants guilty, and committing them to the custody of the marshal to await a warrant for their removal from the southern district of New York to the southern district of Georgia for trial. Thereupon a motion for a warrant to remove them was promptly made before the United States district judge, Hon. Addison Brown, the record of the proceedings before the commissioner being produced and full argument had.

5. On April 4, 1900, after having taken time to consider, Judge Brown delivered his opinion, holding that a valid indictment, supported by evidence identifying the defendants as the persons charged in the indictment, and establishing the fact they were in the district where the indictment was found at the time when the offense was charged to have been committed, was not sufficient to authorize the issue of a warrant of removal over the objection of the defendants; that a certified copy of the indictment was to be treated by the commissioner merely as an ex parte affidavit, subject to be rebutted by evidence offered by the defense, precisely as in a case where there is no indictment.

6. On June 26, 1900, in pursuance of this opinion, Judge Brown made an order sending the case back to the commissioner "for further competent testimony offered by either side in accordance with the opinion rendered herein."

On July 6, 1900, in pursuance of this order, the hearing before the commissioner was recommenced. The Government was compelled to and did introduce a large

number of witnesses, and offered an immense amount of documentary evidence to establish the guilt of the defendants, but closed its case on August 13, 1900.

The defense then consumed more than three months in introducing its evidence, closing on November 16, 1900.

Two days were consumed by the Government in rebuttal, the case upon the testimony being closed November 19, 1900.

The oral evidence before the commissioner covered some 5,000 typewritten pages, and several trunks full of documents were introduced. Voluminous briefs were printed, oral arguments made, and the case finally submitted to the commissioner, who on February 25, 1901—a year and five days after his first finding—made a second finding of probable cause of guilt, this time upon the entire record of evidence, and again ordered the defendants committed to the custody of the marshal to await the warrant of removal.

At once a second motion for a warrant was made to Judge Brown, of the United States district bench.

7. On May 15, 1901, Judge Brown, having taken time to consider, delivered his opinion, holding that not only had the Government established probable cause to believe there was fraud in the letting of the contracts for river and harbor improvements by Carter and the defendant contractors, but that—

It is shown beyond question that Captain Carter, the employee of the Government, and the engineer in immediate charge of the work on the Government's behalf, had, for several years

immediately preceding the contract referred to in the indictment, received from the contractors continuously, through his father-in-law, in many divisions of profits, one-third of the final net proceeds of each contract, remaining for division among the chief contractors, and that this one-third amounted in the aggregate to over $700,000.

On May 28, 1901, in accordance with this opinion, Judge Brown issued his warrant to the marshal for the removal of the defendants to Georgia for trial.

8. But they were not so removed, for immediately upon being taken into custody by the marshal they applied to the circuit court of the United States for the southern district of New York for a writ of habeas corpus, alleging they were being illegally held in custody by the marshal, and attached to the application the processes and pleadings in the proceedings before the commissioner and before the United States district judge, and the several findings of the commissioner and the findings and the opinions of the district judge, together with only so much of the evidence as related to the attack made on the legality of the impaneling of the grand jury, the contention of the defendants being that the indictment was void because of irregularities in impaneling the grand jury, and was, moreover, defective in form and substance, and that there could be no removal upon a complaint supported by proof of guilt, if their contention as to the insufficiency of the indictment could be sustained. It is hardly necessary to say that the United States circuit court (Judge Lacombe) denied the application for the writ. From this order denying their application,

the defendants made, on June 8, 1901, an appeal to this court.

CONCLUSION.

The above statement of the efforts of the Government to secure the removal of Carter ~~and his~~ co-conspirators to Georgia for trial is enough in itself to show the absolute necessity of advancing this case for hearing at the earliest possible time. Judge Brown found that the testimony introduced by the Government before the commissioner showed beyond question that Carter received over $700,000, being one-third of the amount of which the Government was defrauded through this conspiracy. *Carter got over $700,000, and has been doing time in the Leavenworth penitentiary since April 27, 1900. These defendants got twice as much, and are still at large.*

The Government has spent thousands of dollars and used every effort to bring them to trial, but they have not yet even been brought to the bar and compelled to plead to the indictment found against them two years ago. Their whole fight is for delay. The reason is apparent. Already four of the most important witnesses for the Government have died. Their testimony can not be replaced. If it is not possible for the Government to put a stop to the operation of this policy of delay, a deplorable failure of justice in this case will inevitably result.

JOHN K. RICHARDS,
Solicitor-General.

OCTOBER 8, 1901.

O

No. 365.

Reply of Atty. Gen. (Richards) for

Office Supreme Court U.S.
FILED
OCT 26 1901
JAMES H. McKENNEY,
Clerk.

Filed Oct. 26, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

BENJAMIN D. GREENE, JOHN F. GAYNOR, William T. Gaynor, and Edward H. Gaynor, appellants,
v.
WILLIAM HENKEL, UNITED STATES Marshal in and for the southern district of New York.

No. 365.

REPLY TO THE BRIEF OF APPELLANTS ON THE MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

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v.
WILLIAM HENKEL, UNITED STATES MARSHAL in and for the southern district of New York.

No. 365.

REPLY TO THE BRIEF OF APPELLANTS ON THE MOTION TO ADVANCE.

I have just read hastily the brief of counsel for appellants. I have not time to submit their brief to the special counsel who has had charge of the details of this case for correction of its statement of facts. I simply desire to submit to the court that what it contains shows conclusively that the policy being pursued is a policy of delay. Counsel says that they do "object to being sent for trial before a court that they believe will not give them a fair trial, and be there tried on an alleged indictment found by possibly a packed, certainly a picked, illegal grand jury."

This explains the entire situation. These men are naturally opposed to being removed for trial, and now they impugn the integrity of the court before which they must be tried if tried at all.

I ask the court to assign this case for argument at the earliest day in November possible. Appellants took this appeal on June 8, 1901. They ought to be ready now to present it to the court. The Government, on its side, is ready at any time.

JOHN K. RICHARDS,
Solicitor-General.

OCTOBER 25, 1901.

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No. 365.

Brf. of Atty. Gen. for Appellee.

Office Supreme Court U.S.
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JAMES H. McKEN

Filed Nov. 8, 1901.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 365.

BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR and EDWARD H. GAYNOR, *Appellants,*
vs.
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, *Appellee.*
} *Habeas Corpus.*

BRIEF FOR APPELLEE.

MARION ERWIN,
Special Asst. to The Attorney General.
JOHN K. RICHARDS,
Solicitor General.

BARNARD & MILLER PRINT.

IN THE

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vs.	No. 365.
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BRIEF FOR APPELLEE.

STATEMENT OF CASE.

1. On December 8, 1899, at the November term, 1899, of the District Court of the United States for the Eastern Division of the Southern District of Georgia, a true bill of indictment was found by the grand jury, charging in several counts the defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, and others, with conspiring with Oberlin M. Carter, late captain in the Corps of Engineers, United States Army, and engineer officer in charge of the Savannah engineering district, to defraud the United States, and to present false accounts, in violation of Sections 5,440 and 5,438 of the Revised Statutes.

2. On December 14, 1899 (Rec., 39), the defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, were arrested in the South-

ern District of New York on a warrrant issued by John A. Shields, United States Commissioner, based upon sworn complaint (Rec., 7; Amended, Rec., 42), charging them with having committed, in the Eastern Division of the Southern District of Georgia, the offenses described in the indictment, to which complaint a copy of the indictment (Rec., 14) was attached, duly certified. (Rec., 13.)

3. In due course the defendants were brought before the commissioner for hearing on the question of bail or commitment, and were enlarged on bail to await examination (Rec., 39). At the hearing before the commissioner (which will be hereinafter referred to as the "first hearing," to distinguish it from a second hearing had under rulings of his Honor, United States District Judge Brown), the government offered in evidence (Rec., 2 and 3 and 45 and 46), a duly certified copy of the indictment, together with the testimony of witnesses, fully identifying the defendants as being the persons so indicted and proving that they had been in the Eastern Division of the Southern District of Georgia at the period in which they were charged with having committed the offense charged in the indictment. The defendants offered no testimony to show that they were not the persons indicted (Rec., 45 and 46), or to show that they had not been in the Eastern Division of the Southern District of Georgia during the period in which they were charged with having committed the crimes charged in the indictment, but did consume several months in offering testimony tending to disprove their guilt of the charge set out in the indictment, all of which, consisting of nearly 1,100 pages of typewriting, besides documents (Rec., 45), being directed solely to the question of guilt or innocence on

the merits of the case, was excluded by the commissioner as incompetent. (Rec., 3 and 46.)

4. On February 20, 1900, the defendants having ceased to offer testimony at this (the first hearing), the commissioner duly made and entered his order on the complaint, finding probable cause to believe the defendants guilty, and committing them to the custody of the marshal to await a warrant for their removal from the Southern District of New York to the Southern District of Georgia for trial. (Rec., 41.)

Thereupon a motion for a warrant to remove them was promptly made before the United States District Judge, Honorable Addison Brown, the record of the proceedings before the commissioner being produced and full argument had. (Rec., 45.)

5. On April 4, 1900, after having taken time to consider, Judge Brown delivered his opinion (Rec., 45), holding that a duly certified copy of a valid indictment (Judge Brown's first opinion, Rec., 49, and second opinion, Rec., 59), supported by evidence identifying the defendants as the persons charged in the indictment and establishing the fact that they were in the district where the indictment was found at the time the offense was charged to have been committed, was not sufficient to authorize the issue of a warrant of removal over the objection of the defendants; that a certified copy of the indictment was to be treated by the commissioner merely as an *ex parte* affidavit, subject to be rebutted by evidence offered by the defense, precisely as in a case where there is no indictment. (Judge Brown's first opinion, Rec., 46 and 47.)

6. The defendants having been enlarged on bail by him (Rec., 157), on June 26, 1900, Judge Brown made an order sending the case back to the commissioner "for further competent testimony offered by either side in accordance with the opinion rendered herein." (Rec., 41 and 55.)

On July 6, 1900, in pursuance of this order, the hearing before the commissioner was commenced, the defendants appearing before the commissioner in pursuance of said order. (Rec., 55.)

At this second hearing, the government was compelled to and did introduce a large number of witnesses and much documentary evidence to establish the guilt of the defendants, but closed its case on August 13, 1900.

With adjournments obtained and time taken in making as full a defense as if the case were on trial before a jury, the defense did not close its case until November 16, 1900.

Two days were taken by the government in rebuttal, the case upon the testimony being closed November 19, 1900. The oral and documentary evidence before the commissioner was voluminous (Rec., 59). It covered some 5,000 pages of typewritten matter and several trunks full of documents. Extended briefs were printed, oral arguments made, and the case finally submitted to the commissioner, who, on February 25, 1901—a year and five days after his first finding—made a second finding of probable cause of guilt, this time upon the entire record and evidence, and he again ordered the defendants committed to the custody of the marshal to await the warrant of removal. At once a second motion for a warrant of removal was made to his Honor, Judge Brown.

7. On May 15, 1901, Judge Brown, having taken time to consider the voluminous record and evidence submitted to him (Rec., 3), delivered his opinion (Rec., 55), holding that not only had the government established probable cause to believe there was a conspiracy to defraud in the letting of the contracts for river and harbor improvements by Carter to the defendant contractors, but that:

> "It has shown beyond question, that Captain Carter, the employe of the government, and the engineer in immediate charge of the work, on the government's behalf, had, for several years immediately preceding the contract referred to in the indictment, received from the contractors continuously, through his father-in-law, in money, divisions of profits, one-third of the final net proceeds of each contract remaining for division among the chief contractors, and that this one-third amounted in the aggregate to over $700,000." (Rec., 59.)

On May 28, 1901, in accordance with this opinion, Judge Brown issued his warrant to the marshal for the removal of the defendants to Georgia for trial. (Rec., 163.)

8. But the defendants were not so removed, for immediately upon surrendering themselves to the marshal, on June 8, 1901 (Rec., 1), they applied to the Circuit Court of the United States for the Southern District of New York for a *writ of habeas corpus,* alleging that they were illegally held in custody by the marshal. They attached to their application the processes and pleadings in the proceedings before the commissioner and before the United States District Judge, and the several findings of the commissioner and the findings and the opinions of the District Judge, but only so much of the evidence

as related to the attack made on the legality of the impaneling of the grand jury, the contention of the defendants being that the indictment was void because of irregularities in impaneling the grand jury, and was, moreover, defective in form and substance, and that there could be no removal upon a complaint supported by proof of guilt, if their contention as to the sufficiency of the indictment could be sustained.

On the same day, June 8, 1901, that the petition for *habeas corpus* was presented to the United States Circuit Court (Judge Lacombe), the application was denied (Rec., 165), an appeal to the Supreme Court and supersedeas allowed (Rec., 167), and defendants enlarged on bail. (Rec., 172.)

Questions at Issue.

(A.) Was the indictment properly put before the commissioner by a certified copy?

(B.) Was there any sufficient or competent evidence before the commissioner to impeach the finding of the indictment by the Georgia grand jury?

(C.) Was the indictment sufficient in form and substance as a pleading?

(D.) Was the copy of the indictment duly certified, with evidence of identity of defendants as the persons indicted, and proof that they were in the district at the time of the alleged offense, and the finding by the commissioner of probable cause of guilt thereon sufficient in itself to have required the warrant of removal.

(E.) Irrespective of the question of the validity of the indictment, there having been a sworn complaint

made before the commissioner charging a crime against the laws of the United States with sufficient averments to put the defendants on notice, and sworn testimony taken before the commissioner at the hearing establishing, as stated in his finding, probable cause of guilt, was not this sufficient in itself to authorize the warrant of removal?

(F.) Where it appears on the face of a petition to a Circuit Court of the United States that the petitioners are held on a warrant in process of execution regularly issued by a District Judge for removal of defendants to another district within the United States, for trial in a court of the United States in that district, in which court the defendants can raise all the questions made in the petition and have same reviewed in the Supreme Court of the United States or appropriate appellate court, ought not such Circuit Court to refuse to interfere with a case so in process of adjudication, and if it declines for such reason, is it bound under existing law to interfere with the regular course of adjudication by granting supersedeas and appeal?

Many of the questions made in the court below by the defense, and presumably to be insisted upon here, might well upon authority be ignored upon *habeas corpus*. But on account of their bearing upon the future progress of this case, as well as the great public importance attached to the settlement of questions of practice which by erroneous application have very nearly subverted public justice in this case, we have thought proper to discuss them fully.

(A.)

THE INDICTMENT WAS PROPERLY INTRODUCED IN EVIDENCE.

The defendants objected to the introduction before the commissioner of a certified copy of the indictment from the District Court in Georgia:

(a.) Because the original indictment should have been produced and because there is no statute of the United States authorizing the use of a certified copy as evidence.

This objection is discussed and conclusively answered on principle and authority, showing that while a certified copy of an indictment from one court is admissible in another, that the original indictment, outside of the court where it is found, would not be even competent evidence, in

United States v. *McKee*, 4 Dill., 5.

The Supreme Court has said:

> "On general principles of law, a copy given by a public officer whose duty it is to keep the original ought to be received in evidence."
>
> *United States* v. *Percheman*, 7 Pet., 85.

A duly certified copy of an indictment is not only admissible, but has been held at least *prima facie* evidence of the facts alleged.

U. S. v. *Haskins*, 3 Sawyer, 262.
Re Alexander, 1 Lowell, 530.
U. S. v. *Shepard*, 1 Abb., 431.

(b.) Because the certificate to the copy of the indictment was signed in the name of the clerk by his deputy and not by the clerk in person.

This point is covered by decisions in the following cases:

Garneau v. *Dozier*, 100 U. S., 7.
Confiscation Cases, 20 Wall., 111.
See, also, Bacon's Abrdg., Vol. 7, p. 316 L.

(c.) Because there is no certificate of the judge attached to the certificate of the clerk that the certificate is in due form, as required by the Act of Congress providing for certifying records from state courts when intended for use in evidence in other states. (Sec. 905, R. S.)

It is obvious that the statute does not in terms apply to records from the courts of the United States when presented to other United States Courts. And it was not intended to so apply.

Embry v. *Palmer*, 107 U. S., 9.

The reason for the requirement where the record of a state court is to be used in courts of another state is that the latter courts would not know whether the certificate from each state court clerk was in due form and under the seal of a court of record or not. But this is not so as to records of a United States District Court.

Every court of the United States will take judicial notice that the United States District Court for the Southern District of Georgia is a count of record. (*Ex parte* Watkins, 3 Pet., 193.) That it has a clerk (Sec. 555, R. S.) and deputy clerks (Sec. 558, R. S.). That it uses a seal (Sec. 911, R. S.) to give verity to its proceedings, where certified under the hand of the clerk. And that it proceeds according to the cause of the common law. (*U. S.* v. *Reed et al.*, 12 How., 365; *U. S.* v. *Nye*, F. R., 890.)

Therefore the judges of the District Court of the United States for the Southern District of New York is as competent to determine whether the certificate to an indictment from the District Court of the United States for the Southern District of Georgia is in due form as would be the judge of the latter district.

This point has been expressly decided in a well considered case.

Mewster v. *Spalding,* 6 McLean, 24.

(B.)

ATTACK ON EMPANELING OF THE JURY.

The first point made is that the drawing of the names of persons from the box took place in open court at Macon, in the Western Division of the Southern District of Georgia, and not in the Eastern Division of that district, in which division the crime is charged to have been committed:

1st. Because the act creating the divisions provided that crimes committed in a division shall be cognizable in that division.

But all the provisions of this act must be construed together. There was provided only one judge for the entire district, one marshal and one clerk for the entire district, and by expressly providing that "issues of fact" shall be tried in the division in which the cases are pending, the intention is clearly shown not to limit the place of the performance of any of the duties of these officers, which theretofore might have been performed in any part of the district, to a particular division, except in the particular stated.

The Act of 1879 does not require that the jury commissioner take any part in the drawing of names from the box; nor does it require that the judge shall do it himself.

Agnew v. *United States,* 165 U. S., 36.

The fact that the drawing might have been made for, sufficient reasons, in any part of the district, is shown by

the provision in the Act of 1879, that the jury might be drawn from the jury box of any county in the district. All that the law requires in that particular is that the drawing shall be done in a public manner. And this was done. It was done in open court at Macon. (Rec., 62 and 75.) This implied, at least, the presence of the judge on the bench, the clerk or deputy, the marshal, bailiffs and other officers. The testimony is that the district attorney was also present, and others. (Rec., 75.) See:

Barrett v. *United States*, 169 U. S., 218.
Barrett v. *United States*, 169 U. S., 231.

2d. The same objection is urged because the indictment charges that it was found by a grand jury chosen, selected, impaneled and sworn "in and for" the Eastern Division of the Southern Disrict of Georgia, while the actual drawing of names from the Eastern Division jury box was done by the judge while he was physically in the Western Division of the district.

Now, the introductory formula of words used in the indictment comes down from the common law, long antedating the Act of 1879, providing for drawing juries from a jury box, and must be understood with reference to former conditions.

There was a certain kind of choosing when the sheriff summoned a panel to attend the court. There was still further choosing and selecting when, by challenges, to the array, or for cause, the panel was weeded out, and when the jury was empaneled and sworn.

The old law required that the jurors should be from the county, and it is clear that the expression "in and for" had relation to the taking of jurors residing in the body of the county, and the choosing, selecting and empaneling of the jury on return of venire into court.

The evidence is that the jury was drawn from the Eastern Division jury box, the names therein being persons residing in the counties of the Eastern Division. That the jurors were summoned in the Eastern Division by the marshal. That several of those summoned were weeded out by disqualification or legal excuses at the time the court proceeded to empanel the jury in the Eastern Division, and that the jury which returned the bill was a sworn jury chosen, selected, empaneled and sworn in the Eastern Division.

Again:

It is urged that, before a judge can, in order to secure an impartial trial or save expense, draw a jury from a particular part of the district, that there must be an order, and that in this case the order provided that the jurors be drawn from the jury box of the Eastern Division, "from counties in the Eastern Division other than Chatham and Glynn," and that this meant that they must be drawn from all the counties in the Eastern Division other than Chatham and Glynn, and that as there were at the time, in the jury box, the names of persons from only fourteen counties of the Eastern Division, that the drawing was illegal as a departure from the terms of the order.

Aside from the fact that the courts of different districts differ as to whether any preliminary order is necessary, this reasoning is fallacious.

A large part of the Southern District of Georgia was, at the time inaccessible to the ordinary mode of conveyance. The Okeefenokee swamp covers a large section. When the jury commissisoner and clerk were directed to revise the jury boxes in 1897, they were directed to make

up the list from fourteen counties. (Rec., 84.) Counsel for defense, in his final argument, admitted that the selections then made showed that that order was made to save expense. Now, having the jury box so revised before him on November 22, 1899, the judge makes the order (Rec., 96) that the jury be drawn from *that box* from the counties of the Eastern Division other than Chatham and Glynn, in order to promote an impartial trial and save unnecessary expense, and he proceeds, according to the record, forthwith to draw the jury from the jurors in the counties of the Eastern Division in that box, other than those residing in Chatham and Glynn. (Rec., 88, 89, 90, 62, 70.) Can there be any doubt as to what counties of the Eastern Division were meant by that order of November 22, 1899? Two contemporaneous orders or acts, relative to the same subject-matter, must be construed together.

Again:

Counsel, over the objection of the government (Rec., 100) that he could not collaterally attack the record of proceedings in a court of record by oral testimony, introduced the testimony of Mr. S. F. B. Gillespie, Deputy Clerk at Savannah, to show the following:

That there were in the Eastern Division jury box on November 22, 1899, the date of the drawing of the jury in question, the names of jurors which had been put in there by the clerk and jury commissioner, and which up to that time had never been drawn:

From Chatham County (Rec., 136)	194
From Glynn County (Rec., 137)	12
From the other twelve counties in a box (Rec., 137)	159
Total in box (Rec., 137)	365

It is contended by the defense that the fact that there were not in the box 300 names at the time of the drawing from the *particular parts* of the division from which the court directed the jury to be drawn, makes the drawing totally *void*, because the *act* says that there shall be in the box 300 names at the time of the drawing.

Now, the Supreme Court has expressly held that the Act of 1879 did not repeal these other sections of the Revised Statutes, but must be construed in connection with them.

St. Clair, 154 U. S., 134-147.
Agnew v. *United States*, 165 U. S., 36.

The provisions of Section 802, R. S., were to afford an easy and convenient method of securing an impartial trial free from local prejudice. This is the real reason which justifies the existence and jurisdiction of the United States Courts.

Could it ever have been intended that in drawing a jury from the jury box from particular parts of the district, the court should stop to ascertain if there were three hundred names in the box in the particular locality in the district from which the jury is to be taken?

We think that question is covered in effect by the decision in

Agnew v. *United States*, 165 U. S., 36.

If not, then it certainly is by the reasons and rulings of Judge Billings in the Rondeau case.

In that case:

There were in the box, jurors	303
Of whom there were disqualified	3
And dead	3
Leaving in the box	297

The judge held that a plea in abatement on the ground that there were less than 300 names in the box at the time of the drawing, was not good. Besides the construction he makes on the act, he shows that the cutting down of the number from which the drawing is actually had, operates impartially and does not infringe on the purposes for which the general provision is made.

United States v. *Rondeau,* 16 F. R., 109.

Again:

It is objected that the making up of the jury box in 1897 by the clerk and jury commissioner, two years prior to the drawing, is invalid, because the deputy clerk testified (Rec., 116) that he put in the tickets prepared under the direction of the clerk, and in his presence and under his supervision, and that it was not done by the clerk with his own hands.

If the deputy had done it by himself it would have been sufficient, unless, perhaps, some question of politics were introduced.

As stated in Bacon's Abridgement, a deputy can rarely have less power than his prinicpal.

7 Bacon Abridg., Vol. 7, p. 316 L.

But here it was done under the eye of the clerk.

Again:

The deputy testified that the jury commissioner and clerk each prepared their tickets with the names on them to be put in the box. That all the names were first recorded in a book or jury list. (Rec., 116.) The jury commissioner prepared his own list (Rec., 116), and the

clerk and deputy, the clerk's list. (Rec., 116.) He testified:

> "Mr. Elliott and I put them in alternately; he would put in some and I would put in some others. Q. (By Mr. Rose): You mean he would put in a bundle? A. He would put in a bunch as I folded them, and I would put in a bunch as I folded them. They were made on typewritten paper, with space between, down this side of the sheet and down the other side, and cut in two, then cut crosswise, and then folded once. When folded, the names could not be seen." (Rec., 116.)

I submit that whether the jury commissioner and clerk misinterpreted "alternately" or not, by putting in a "bunch" alternately, instead of a single ticket alternately, that it was a mere irregularity from which no harm could come, with the other precautions taken of preparing equal lists, recording the names and mixing them properly before they were put in the box. And the defense has shown no prejudice from it.

Any irregularity arising from motives which are not of an evil character, and by which the defendants are not shown to have been prejudiced, cannot invalidate an indictment.

U. S. v. *Ambrose*, 3 F. R., 283.
Agnew v. *United States*, 165 U. S., 36.

Again:

It is claimed by the defense, however, that the indictment was invalid, because it was testified by the deputy clerk that it had been the practice in the Southern District of Georgia to put the names of jurors drawn in an envelope at the time of the drawing, and put the envelope back in the box, and that after a year or two, when the

time within which the persons might serve again, as provided by statute, had expired, to commingle those names with the other names in the box which had never been drawn.

Now, the defendants have put in evidence (Rec., 119 to 133) a copy of the panel of every jury drawn from the box from the time of its revision in 1897, to the drawing of the Grand Jury, on November 22, 1899, and there is not a *single* name in the Grand Jury panel drawn November 22, 1899 (Rec., 146) which appears to have been ever drawn before. So that if any such names were put back, it cannot possibly affect this case.

But there was nothing wrong in the practice, it has always been the practice in the Southern District of Georgia, growing out of a construction of the law long antedating the appointment of the present judge, and the deputies produced by the defense testified to it only as a practice, and not as a fact as affecting this case.

The providing of a proper number of names with proper qualifications, and the putting them in the box in the manner provided by the statute, is a means provided to secure a body of jurors free from political bias, or bias in a particular case, from which a jury may be drawn for particular cases. There is nothing in the statute which prevents the use and re-use of the same names again when the year of exemption is out, unless it is the provision that the box shall contain 300 names at the time of the drawing, "which shall have been placed therein by the clerk and jury commissioner." In either view of it, they would be names which were placed in the box at the time of the making up of the box by the clerk and jury commissioner, and such jurors are necessarily as free

from bias in any particular case as the remaining jurors in the box who were selected by the clerk and jury commissioner at the same time.

But if that view is not correct, as no name returned to the box is on this panel of Grand Jurors, and as there were over 365 names in the box exclusive of any names which *might* have been returned thereto, the point made does not touch this case.

So much for the points made on the validity of the finding of the indictment considered on their merits.

I insist that none of this evidence ought to have been received by the commissioners over the objections made by the Government at the time. (Rec., 100.)

The acts of a court of record must be shown *by the record* which imports verity.

3 Blackstone Com., p. 24.
20 A. & E. Ency. Law, p. 502.

There were many inaccuracies in giving details of what was done, in Mr. Gillespie's testimony. I do not mean intentionally. See how Mr. Rose has to tell him that he is contradicting the record and making a mistake. (Rec., 102.) It shows the absurdity of bringing up the minor officers of a court of record as witnesses in a collateral proceeding to show what the judge did when he was on the bench. And to show what the clerk and jury commissioner did, by a subordinate of the clerk, when neither of these principal officers is called. If errors are committed by a judge in a court of record, they must be corrected by a direct proceeding in that court. This rule is fundamental.

The attack on the indictment does not go to the guilt or innocence of the accused, but to a matter of procedure in the court in Georgia. It cannot be made otherwise than by a plea in abatement in that court.

Agnew v. *United States*, 165 U. S., 36.

Again:

The rule as stated by the Supreme Court, is that the defendant must take the *first opportunity* to raise such an objection. That a delay of five days after an indictment, found without sufficient excuse for the delay, is fatal to such a plea.

Agnew v. *U. S.* 165 U. S., 36.

In the case at bar, the indictment was found on December 8, 1899. The defendants were arrested in New York on December 14, 1899, on charges based on that indictment, and the bench warrants issued from the court in Georgia. They were put on notice then of the pendency of the indictment, and are charged, as matter of law, with a knowledge of every intervening term of court from that time until now. From the time of their arrest the Government has been earnestly endeavoring to get them to the point of pleading to the indictment. They have pulled back with all the tenacity they have been able to exert. Nothing has kept them away but their own wills.

Mr. Rose, their attorney, representing them in the preliminary proceeding here to hold them to bail to answer to that indictment, was even served with notice by the marshal, from the district attorney, of the particular time and place when and where the defendants could be heard in these matters at the February Term, 1900. They

wholly failed to appear. (Rec., 155-156-161.) Mr. Rose has endeavored to disclaim any responsibility as attorney in this matter, claiming he does not represent the defendants in Georgia, but his own letter recognizes (Rec., 157) that the proceeding in New York is part of "the same case" as that pending in Georgia.

Even if this be a technical objection on the question of validity of service on a particular person, the law does not require that they shall be served with notice of the terms of the court. The certified copy of the notice to Mr. Rose, his reply that he requested to have put of record with the notice and order thereon, shows, at least, that there was a court held at which they might have appeared and filed their pleas in abatement, and that they did not appear.

To allow them now to attempt to set aside the indictment after waiting until, as they contend, the statute of limitations had run in July, 1900, is to allow them to do just what the rule, in regard to filing such pleas at the first opportunity, was intended to cut them off from doing. That the grand jury was illegally constituted will not be inquired of by *habeas corpus*.

Re Haring, 120 U. S., 782.

(C.)

THE INDICTMENT IS SUFFICIENT IN FORM AND SUBSTANCE. ITS ANALYSIS.

1ST COUNT.—CONSPIRACY.—SEC. 5,440, R. S.

In bare outline an analysis of the 1st count of the indictment shows that it charges, by way of inducement, that the defendants (contractors) and the government engineer officer in charge of the Savannah engineering district, had formed and operated for some years in the district a certain scheme to defraud the United States under contracts for river and harbor improvements, which scheme is fully described and set forth in detail. The devices to be used as set forth and described were of three classes: (a) those relating to the fraudulent letting of the contracts to the defendants without competition and at exorbitant prices; (b) those relating to the execution of the work not in accordance with the specifications and fair dealing, and the acceptance of such work by the engineer, and (c) those relating to the approval and payment by the engineer of accounts to be rendered for such work on such contracts at such exorbitant and fraudulent prices, and the division of the fruits of the fraud between the engineer and the contractors. It is further charged by way of inducement, that on October 8, 1896, the defendants had fraudulently obtained from said engineer office, by means of said scheme, two certain contracts, described, let by said engineer officer in the district. The direct charge is then made that

"The said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A.

Connolly, and Oberlin M. Carter, on said first day of January, 1897, in the said eastern division of the Southern District of Georgia, then and there unlawfully, knowingly and feloniously amongst themselves and with said divers other persons to the grand jurors aforesaid unknown, did band, conspire, confederate and agree to gether as aforesaid, to defraud the United States of said divers large sums of money hereinbefore mentioned, by means of applying said fraudulent scheme in and to the execution and completion of the work under said contracts so made on the 8th day of October, 1896, as aforesaid, and in the obtaining of the money for the fraudulent accounts which should be rendered under said contracts to said Oberlin M. Carter, as such engineer officer as aforesaid, and generally to carry said fraudulent scheme into execution in the obtaining of all contracts of like character which might thereafter be let in said Savannah district by the United States through the said Oberlin M. Carter, as such engineer officer."

Criticisms on the First Count.

In his first opinion, his Honor, Judge Brown, expressed some doubt as to the sufficiency of this count (Rec., 50), though he refrained from expressing definitely an opinion upon it. (Rec., 52.) Let us see if the grounds of his doubts are well founded. He says (Rec., 50):

"As the original fraudulent scheme of conspiracy is alleged to have been in continuous process of execution from January, 1891, to October, 1897, and therefore included the two contracts of October 8, 1896 (the only subjects in the indictment), it is evident that the averment of a new conspiracy on January 1, 1897, to apply the old conspiracy to the execution of the contracts obtained by means of the former one (at the time excluded by the statute of limitations), and already in course of execution, is only a pleader's device to avoid the effect of the

statute of limitations, as against the original fraudulent scheme. *But as each new overt act in furtherance of the common purpose becomes in law a new conspiracy, the time of the conspiracy may be laid within the period of the statute of limitations, if the overt act was within that perid, the prior combination, if established, and the later overt act being evidence from which a jury may infer the new conspiracy.* (*People* v. *Mather*, 9 Wend., 229; *Com.* v. *Bartilon*, 85 Penn. St., 482-489.)"

Now, it is most respectfully submitted that the drafting of the indictment in that form was not merely a pleader's device, but that it was properly and necessarily done to conform the pleadings to the facts. In truth, the facts as pleaded express the actual mental processes by which the conspiracy of January 1, 1897, was formed.

Consider in this connection the actual facts as developed in the evidence before the commissioner when the judge sent the case back to him for further evidence. The learned judge states in his second opinion in considering this evidence (Rec., 59), that the Government had actually demonstrated a division of the profits of the contracts by thirds between Carter and the contractors for several years preceding the contracts of October 8, 1896. (Quoted, *ante*, p. 5.) It was a fact, therefore, that there was a scheme to defraud the Government in operation by the defendants in the district, preceding the letting of the October, 1896, contracts. The fact, too, that the profits were continuously divided in thirds between the engineer and the two principal contractors, shows that these were not isolated acts of fraud, but a well-set scheme in continuous operation.

Now, the additional facts were proved, that after obtaining by means of the scheme the contracts of Octo-

ber 8, 1896, the Atlantic Contracting Company, in whose name they had obtained the contracts, had no money to carry on the work. There was no appropriation by Congress available from which Carter as engineer officer could advance the money from month to month as the work progressed as had formerly been done. So that when the work commenced and got under way about January 1, 1897, it was absolutely necessary that there should be *a new meeting of minds* between the conspirators to arrange for carrying on the work, and mutual contributions of money for that purpose. That there was such a new meeting of minds on or about January 1, 1897, was shown by the fact that commencing from the latter part of December, 1896, and running on to June, 1897, Carter and the two principal contractors, Greene and John F. Gaynor, each from time to time alternately contributed money, aggregating about $50,000 each, toward the conduct of the work, and that when the appropriation by Congress became available in July, 1897, they were each paid back his contribution before the division by thirds between them was made.

This evidence was not brought before the Circuit Court on the petition for *habeas corpus,* it as well as all other evidence on the question of guilt being omitted, but we are entitled to any theory of facts which, if proved, would sustain the pleading.

Now, what was the mental process involved in the new meeting of minds which took place on or about January 1, 1897? Was it not that each would contribute his share in money and labor in the construction of the work under the contracts of October, 1896, which they had obtained by the fraudulent scheme, and that they would

apply that scheme to the execution of the work under those contracts and to the obtaining the money for it? If so, why should not the pleader charge the conspiracy when the new meeting of minds took place, and describe the mental process as it actually occurred or was understood between the parties at the time?

This is the kernel of the decision in *People* v. *Mather*, 9 Wend., 229, expressed in the extract quoted, *supra*, by his Honor, Judge Brown. And if, as there stated:

> "The prior combination, if established and the later overt act are evidence from which a jury may infer the new conspiracy,"

it follows that in such case there must be a new conspiracy in fact. And if it be proper and necessary in such case to prove the prior combination, it will be equally appropriate and necessary to set out in the indictment the prior combination as inducement before charging the new conspiracy at the time of the later concerted overt acts.

There are many cases where the commission of acts constituting one crime have to be set out in the indictment as inducement to charging the commission of another crime.

Bouvier's Law Dictionary, Inducement.

An illustration is found in the case of Goggins, where a true certificate was presented to an officer for payment within the three years' limitation, and it was held that evidence was admissible to show that the person presenting it had obtained it by fraud prior to the time when the statute of limitations began to run.

U. S. v. *Goggins*, 9 Biss., 419.

Again:

His Honor, Judge Brown, in his first opinion, expressed (Rec., 51) a doubt as to whether the means by which the conspiracy was to be carried out was sufficiently set out in the first count of the indictment. He admits that in describing the scheme to defraud, the devices to be used are set out with a wealth of particularity above criticism. But, he says:

> "Of the fifteen or twenty devices which it is alleged that scheme contemplated, three-fourths relate to the terms, specifications, and letting out of the contracts themselves, so that most of the scheme could not possibly be applied to a conspiracy formed January 1, 1897, several months after the contracts were to be let out. Of the remaining means or devices what ones are meant to be charged is left wholly undefined."

As already stated, however, the scheme to defraud was made up of devices fully described, (a), relating to the letting of the contracts, (b) relating to the doing of the work under the contracts, and (c) relating to presentation and approval of accounts, the payment of the money on the same and the division of it among the conspirators.

When, therefore, it is charged that the two contracts of October 8th, 1896, had been obtained by the defendants by means of the fraudulent scheme, can there be any doubt that it was intended by that language to convey the idea that the devices described in the scheme relating to the *letting* of the contracts were used in obtaining them? And when it is charged that after so obtaining said two contracts by means of said fraudulent scheme, the defendants on January 1, 1897, agreed to defraud the United States by applying said fraudu-

lent scheme in and to the execution and completion of the work under said contracts and in obtaining the money on fraudulent accounts which should be rendered under them, can there be a doubt that it was intended by that language to convey the idea that the devices described in the scheme relating to the execution of the work, were the devices agreed to be applied in the execution of the work under these contracts, and that the devices described in the scheme relating to the presentation and approval of accounts and obtaining money on them, were the devices agreed upon to be applied to the presentation of accounts and obtaining money on them under these two contracts?

Again, where the argreement, as indicated by the evidence in this case, was to use some one or more or all of the devises described as occasion might require to accomplish the fraud, what principle of law or of good pleading requires the pleader to specify which ones of the several devices described would be actually used?

If *any* of the devices agreed upon, if put in operation, would affect a criminal fraud under the statute, and the indictment charges the agreement as it was made, the indictment as to these averments must be sufficient. As stated by this court, the object of setting out the means is "that the court may see that they are in fact illegal."

U. S. v. *Cruikshank*, 92 U. S., 542.

It is appropriate to note here that in the twelfth line from the bottom of the first count of the indictment as it appears in the printed transcript, p. 19, there is a clerical error made by copyist or printed. The word herein*before* as it appears in the original indictment and certified copy in evidence is printed "hereinafter." A similar

error appears in the printed transcript, page 14, in the misspelling of the word "hundred" at the beginning of the first count of the indictment. These errors will be considered as corrrected by agreement of counsel or the court will be asked to inspect the original record from the court below.

2D COUNT—OVERT ACT.

(Under Conspiracy Set Out in First Count.)

The second count of the indictment, analyzed, shows that it charges that in "pursuance of said conspiracy," set forth in the first count of the indictment, two of the defendants, Connally and Carter, knowingly prepared, on March 17, 1897, a document with false signatures and false witnesses, giving to the defendant contractors, without competition, an important contract for harbor improvement by dredging, and that Carter approved this contract and recommended its acceptance.

Criticism of this Count.

His Honor, Judge Brown, in his first opinion, criticised (Rec., 51) this count as follows:

"The overt act charged in the second count is irrelevant, since it does not appear to be in any way connected with the conspiracy alleged, nor within any one of the means or devises set forth in the conspiracy court."

Let us see if that is true.

The scheme set out in the first count charges, among others, the following devise (Rec., 15):

"That the said fraudulent scheme contemplated that the said Oberlin M. Carter should as such engineer offi-

cer of the United States so in charge of said Savannah district, so fraudulently exercise the said power of his office and the said discretion so vested in him (which powers and discretions are specified previously in the indictment) that competition in the bidding for such river and harbor contracts to be let for the United States, through him, should be cut off, and that the said Benjamin D. Greene, etc. (the defendants, naming them), in the name of some one of them, or of some other person or corporation for their benefit would be the only real bidders for such contract work in said district, etc., * * * and so that the said works in said district put out to be done for the United States on such contracts would be let at high and exorbitant cost to the United States of America."

It is further charged in the first count that on January 1, 1897, the defendant not only conspired to apply the fraudulent scheme to the execution of the work and getting the money on the contracts of October 8, 1896, previously obtained, but (Rec., 19):

> "Generally to carry said fraudulent scheme into execution in the obtaining of all contracts of like character (river and harbor contracts) which might thereafter be let in said Savannah district by the United States, through the said Oberlin M. Carter as such engineer officer in charge."

If, therefore, in pursuance of the conspiracy described in the first count, Carter knowingly assisted in preparing such a contract with false signatures to it, and approved it and recommended its acceptance without competition as charged in the second count, how can it be seriously contended that the act charged is not within the means or devises set forth in the conspiracy count?

Moreover, the overt acts are no part of the crime, but simply show that the *locus penitentia* is past. And it need not appear on the face of the indictment in what way the overt act charged would tend to effect the object of the conspiracy.

U. S. v. *Donau*, 11 Blatchf., 168.
U. S. v. *Britton*, 108 U. S., 199.

The learned judge had recognized and stated this as the law in the same opinion just two pages preceding the criticism, but seems to have overlooked it in the application. He says (Rec., 49):

"It is held to be sufficient, therefore, if the overt act is so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation."

3D, 4TH AND 5TH COUNTS.—OVERT ACTS.

(Under Conspiracy Set Out in First Count.)

The third count of the indictment, analyzed, shows that it charges that "in pursuance of said conspiracy" set forth in the first count, the defendants on July 1, 1897, caused to be *presented* to Carter as such disbursing officer a *certain claim* against the United States, which claim is set out in the count in the form of an account in words and figures, and it is further charged they knew the claim to be false and fraudulent.

The fourth and fifth counts are framed on the acts performed by Carter of the *issuing of two certain checks* as disbursing officer, described in the respective counts, and which checks, it is charged, he issued for claims

presented by the defendants which he knew to be fraudulent.

Criticisms on the 3rd, 4th and 5th counts.

His Honor Judge Brown in his first opinion (Rec., 51, 52) criticises these counts because he says they do not set out the details which made the claims fraudulent. The criticism might have some point if the counts were relied upon as counts charging the presentation of false accounts as separate crimes on which we were seeking to convict the defendants.

The learned judge seems to have overlooked the fact that the charge is conspiracy, and the 3rd, 4th and 5th counts are merely statements of certain specific "acts" done to effect the object of the conspiracy,—acts which are charged, to show that the *locus penetentia* had been passed.

The allegation in the 3rd count that the defendants in pursuance of the conspiracy *presented* the claim (set out in words and figures as an account), is the allegation of the doing of an act, which put the conspiracy in operation and is sufficient in itself. The further allegation that the defendants knew the account to be fraudulent may be treated as surplusage. And therefore that the pleader did not describe the details which made the account presented fraudulent is immaterial.

So in regard to the 4th and 5th counts, the acts charged were the "issuing" by Carter of the checks described. The further allegation that he knew that the claims on which they were issued were fraudulent was unnecessary. and therefore a failure to describe the details of the fraud in the claims cannot be error. The averment is to be treated as surplusage or mere statement of aggravation.

(Whar. Amer. Crim. Law, Sec. 2335.) That the checks were issued in New York does not affect the jurisdiction of the conspiracy in Georgia.

Dealy v. *United States*, 152 U. S., 539.

"In Pursuance of."

Some criticism was made by counsel for the defense, in the argument before the district judge, of the use by the pleader of the common law expression "in pursuance of" instead of the expression used in the statute to "effect the object of," in charging the overt acts. This objection was abandoned. Either form is sufficient.

U. S. v. *Boyden*, 1 Lowell, 266.
U. S. v. *Nunnemacher*, 7 Biss., 137.
U. S. v. *Dustin*, 2 Bond, 332.

Conspiracy and Overt Acts in Separate Counts.

Some criticism of the form of the indictment was made by counsel for defense before the commissioner because of the fact that the overt acts, while charged to have been done "in pursuance of the conspiracy," were set out in separate counts from that in which the conspiracy was charged, referring back, by suitable allegation, however, to the conspiracy count.

This contention was abandoned before the district judge. It was not sound. One count of an indictment may refer back to allegations of a previous count so as to incorporate its provisions by reference, and that, even where the previous count standing by itself would be totally defective.

Crain v. *United States*, 162 U. S., 625.
Blitz v. *United States*, 153 U. S., 308, 317.

Again, the form is good on another principle. The act of conspiracy to do the things mentioned in the statute is certainly unlawful whether an overt act is committed or not. The punishment, however, only attaches when an overt act is committed. When, therefore, the pleader concludes the description of the conspiracy, in the first count, by the words "contrary to the form of the statute, etc.," it is a mere declaration that the conspiracy itself was unlawful. Either the use or the omission of these words would be a mere matter of form.

Frisbie v *United States,* 158 U. S., 168.

So that if you treat them as surplusage, you take up the next count, and connect it with the conspiracy count in exactly the common law form.

At common law allegations of overt acts were treated merely as statements of aggravation and surplusage.

Wharton Amer. Crim. Law, Sec. 2335.

As under our statute, they must be pleaded, where there are several overt acts deemed necessary to be pleaded, the adoption of any different method from that pursued in this case would require much useless repetition and tend only to render the pleadings cumbersome.

There are several precedents for this method; a notable one was in the case of

U. S. v. *Lancaster et al.,* 44 F. R., 886-931.

6TH COUNT, CONSPIRACY, 5440 R. S.
OVERT ACTS, 7TH AND 8TH COUNTS.

An analysis of the sixth count of the indictment shows that the pleader undertook to charge the new conspiracy, formed on or about January 1, 1897, as indicated by the concerted overt acts committed then, without reciting by way of inducement the antecedent scheme or combination, as had been done in the first count.

No criticism whatever has been made on the sufficiency of this count as a charge of conspiracy, except that it charged a conspiracy in reference to contracts "to be let."

Criticism.

His Honor Judge Brown, criticising this count, in connection with the overt acts charged under it in counts 7 and 8, says (Rec., 52):

> "The conspiracy charged in the sixth count relates wholly to future contracts to be let thereafter, *i. e.*, after January 1, 1897, while the overt acts stated in counts seven and eight relate wholly to the prior contracts of October 8, 1896. On this additional ground, counts 6, 7 and 8 would seem to be necessarily bad."

The learned judge, however, overlooks the principle, previously recognized by him in the same opinion (Rec., 49), and clearly stated by the court in Danau's case, that it is not necessary that it should appear on the face of the indictment in what way the overt act charged would contribute to effect the object of the conspiracy.

U. S. v. *Donau,* 11 Blatchf., 168.
U. S. v. *Britton,* 108 U. S., 199.

And while count 7 does relate to the presentation on July 1, 1897, of an account to Carter under the October 8th, 1896, contracts, and while count 8 does relate to the issue by Carter on July 6, 1897, of a check for $345,000 in payment for work done under contracts of October 8, 1896, it is an unwarranted assumption that the acts involved *related wholly* to the contracts of October 8, 1896. The actual conspiracy formed was broader than the letting of any one contract. The attempt to get the supplemental contract in March, 1897, as described in the second count, shows that as renewed on January 1, 1897, the conspiracy looked to getting future contracts fraudulently without competition. And if Carter had not been removed from his official position in the district in July, 1897, undoubtedly many other future contracts would have been obtained under the conspiracy, if as charged there was such conspiracy on January 1, 1897. To what extent the payment and illegal diversion of this $345,000 in July, 1897, between the conspirators would contribute and was intended to contribute to the carrying on of the renewed conspiracy of January 1, 1897, is a matter of proof, and inference to be determined from the proof when the case is put on trial, and is not to be disposed of because it may not appear in the allegations in the pleadings. As the learned judge himself said (Rec., 49):

> "It is held to be sufficient, therefore, if the overt act is so described as to apprise the defendant what act is intended to be given in evidence as tending to show the unlawful agreement was put in operation."

If we are not right in this contention it shows that the most felicitous way of pleading the new conspiracy of January 1, 1897, evidenced by the concerted acts then committed, was the method adopted in the 1st count, in

which the prior combination and the prior fraudulent obtaining of the contracts of October 8, 1896 (although acts in themselves barred by the statute of limitations), are set out by way of inducement, to charging the renewed conspiracy of January 1, 1897. That we have the right to charge a new conspiracy as of that date, if concerted overt acts were committed then, is clearly ruled in the authorities quoted by his Honor Judge Brown (Rec., 50).

Whenever there is a new meeting of minds in concurrent action to effect an unlawful purpose there must be a new conspiracy.

9TH AND 10TH COUNTS—CONSPIRACY—5438 R. S.

An analysis of the 9th count of the indictment shows that a conspiracy is charged under Section 5438 R. S. between the defendants to defraud the government of the United States by obtaining the allowance and payment by the United States, through Oberlin M. Carter as government engineer in charge of river and harbor improvements in the Savannah district, of a certain claim for labor and material claimed to have been furnished by the Atlantic Contracting Company under the contract of October 8, 1896, which is described, which claim was for the sum of $345,000, "for work, labor and supplies claimed to have been furnished to the United States by said Atlantic Contracting Company for said work at Cumberland sound during the months of December, 1896, January, 1897, February, 1897, March, 1897, April, 1897, May, 1897, and June, 1897." And an overt act—the presentation of one voucher—is charged in the same count. The 10th count is similar to the 9th.

Criticism.

His Honor Judge Brown in his second opinion held these two counts to be good. (Rec., 59.)

But in his first opinion he said as to the 9th and 10th counts (Rec., 52):

> "I should regard these counts as good had the nature of the fraud been sufficiently indicated. Without passing definitely upon these objections to the indictment as a pleading, they are much more important when the indictment is offered as evidence, etc."

As counsel for the defense are still insisting on the insufficiency of these counts, it is as well to say:

That the count is not framed on the crime of having presented a false account or false claim, but upon a *conspiracy* to defraud the United States by obtaining the allowance and payment by an officer of the government of a fraudulent claim for $345,000 for labor and supplies.

The gist of the offense is the corrupt agreement, and the crime would be as complete whether the defendants had agreed definitely upon the different elements of fraud which should go to make up the claim or not.

The reason for the application of a different rule to allegations of conspiracy to defraud by presenting false claims or accounts, is that the general principles controling the form of an indictment for conspiracy must be applicable to all such cases, and ordinarily conspirators agree to consummate frauds on general lines without specifying the details of fraud which shall enter into each particular overt act.

See *U. S.* v. *Dustin*, 2 Bond, 332.

No Merger.

The defendants claim, however, that because the count charges as an overt act the presentation of a voucher in pursuance of the conspiracy, that there was a merger of the conspiracy in the completed act, and therefore we must plead the case as if for the presentation of a false account.

It is well settled there is no merger in such cases.

U. S. v. *Rindshoff,* 6 Biss., 265.
U. S. v. *DeGrief,* 16 Blatch., 20.
U. S. v. *McKee,* 4 Dill., 128.
U. S. v. *Martin,* 4 Cliff., 156.

Ordinarily where the conspiracy and the completed offense are separate crimes, the conviction may be of either crime or both.

U. S. v. *Boyden,* 1 Lowell, 266.

No Misjoinder.

There has been no misjoinder of counts in this indictment.

1024 R. S.
Ingraham v. *United States,* 155 U. S., 434.
Painter v. *United States,* 151 U. S., 396.

If any of the conspiracy counts be good, and a single overt act done in pursuance of the conspiracy be properly charged, it is sufficient, though other counts be bad.

Horner v. *United States,* 143 U. S., 207-213.

(D.)

CERTIFIED COPY OF INDICTMENT WITH EVIDENCE OF IDENTITY SUFFICIENT FOR REMOVAL.

Reviewing certain extradition proceedings had before a committing magistrate under our treaty with Mexico, this court said that under the terms of the treaty *it was intended to confer upon the committing magistrate the same duties and powers usually exercised by them on preliminary examinations in criminal cases in the United States.*

Benson v. *McMahon,* 127 U. S., 457, 461, 463.

In another case arising upon inter-state requisition, the Circuit Court of Appeals (Judges Lacombe and Shipman) held it was not competent to go behind the allegations of the requisition affidavit and finding of the governor thereon on the general merits of the case.

In re White, 55 F. R., 54.

This court held that on requisition from New York for a fugitive arrested in Georgia, a certified copy of an indictment in New York was sufficient and that matters of fact not arising on the face of the indictment were for the trial court.

Roberts v. *Reilly,* 116 U. S., 80, 96.

In his first opinion, however, these decisions were brushed aside by his Honor Judge Brown with the statement (Rec., 49):

> "The extradition cases cited on the argument, whether interstate or international, are wholly inapplicable. Both those proceedings are regulated by wholly different statutes or by treaty stipulations."

But the learned judge overlooked the fact that this court had put its decision in the Benson case (*supra*), upon the ground that the proceedings under that treaty was intended to be assimilated to the usual procedure in the United States.

We think that the correct rule on this point is laid down in Belknap's case, decided in 1899 by Judge Evans in Kentucky. He held that:

> "If the indictment be valid on its face and charged a crime in the district where it was found, it *is conclusive* evidence of probable cause, but if the court on inspection of the indictment sees that crime is not clearly charged to have been committed in the district where the indictment is found, no case for removal is made."
>
> *In re* Belknap, 96 F. R., 614.

This, of course, presupposes that the defendant has been identified as the person indicted. Similar rulings had been made in earlier decisions by other judges, except that the question as to whether the indictment was conclusive evidence or only *prima facie* evidence on the merits was left open as unnecessary to be decided in those cases.

U. S. v. *Haskins*, 3 Sawyer, 262.
Ex parte Alexander, 1 Lowell, 530.
U. S. v. *Sheppard*, 1 Abbott, 431.

It is true that in 1878 Judge Lowell refused a warrant of removal where it appeared the indictment was ambiguous, and it was shown that the defendant had not been in the district where the offense was charged to have been committed in twenty-four years.

Pope's case, 27 Fed. cases, 593.

And in 1885 Judge Parker, in Arkansas, held that on *habeas corpus* proceedings the judge could go behind the indictment, so far as to see whether it be possible that the defendant could have committed the crime in the district where charged.

U. S. v. *Rogers,* 23 F. R., 658.

And in 1892 Judge Butler in Pennsylvania held, that where the defendant was never in the district where he was indicted, the court would allow evidence of that fact to be introduced, but he expressly held:

> "The court will not, of course, hear the relator's defense and try the case."

U. S. v. *Fowkes,* 49 F. R., 50.

But in these three decisions the evidence admitted was all directed to jurisdictional facts, embraced practically in the question of identity or jurisdiction of the court where the indictment was found, over the person of the defendant.

The Dana Case.

A new doctrine, however, was introduced into the removal practice through certain unnecessary dicta in the ruling of his Honor, Judge Brown, in the Dana case (68 F. R., 886).

No one will quarrel with the final result arrived at by the learned judge in that case on the statement of facts there made. The error there, we think, was made in the introduction unnecessarily of the new doctrine which reduced the dignity and effectiveness of an indictment to that of an *ex parte* affidavit in a preliminary hearing for commitment.

In the dispute had between this government and Mexico over the Cutting case, in which case Cutting was indicted in Mexico for publication of a libel in Texas, because of the fact that his paper had been circulated over the border, our state department took the position that, by the general law of the land, recognized by all civilized governments, the place of publication of a newspaper fixed the jurisdiction of the crime. This seems to be the only reasonable doctrine. From the facts stated in the opinion in the Dana case it appears that the place of publication of the libel in that case was New York, and that only the state courts in New York had jurisdiction of it. This was sufficient to dispose of the case *on jurisdictional* grounds.

GREENE-GAYNOR CASE, 100 F. R., 941.

The *dicta* announced in the Dana case, that the indictment is to be treated as a mere affidavit in removal proceedings, was made the basis of the first opinion delivered in this case by his Honor Judge Brown in refusing the removal warrant, after the finding of probable cause by the commissioner based on a certified copy of indictment held by the judge to be sufficient as a pleading, and on evidence of identity. He says (Rec., 49):

> "As explained in the Dana case, those two questions are altogether distinct, and while I have some doubt, but do not need to pass on the question of the sufficiency of the indictment *as a pleading*, I have no doubt that, *viewed as an affidavit*, it is insufficient *in its statement of facts* and circumstances to justify a removal when, as in this case, an examination has been demanded by the accused and its sufficiency challenged."

In other words, the sufficiency of the indictment for the purpose of accomplishing a removal is attacked because it fails to transgress every rule of good pleading.

Mr. Bishop says:

> "Neither is it necessary to state mere matter of evidence which the prosecutor proposes to introduce unless it alters the offense, for if so it would make the indictment as long as the evidence, and upon this principle it has been held that an indictment charging defendants with conspiring by divers false pretenses and undue means and devices to obtain money of A, B and to cheat him and defraud him thereof, is sufficient without setting forth the particular means or pretenses."
>
> 1 Bishop's Crim. Proc., Sec. 276.

The indictment in the case at bar has gone very far beyond this, not only in setting out the means intended to be used, but specifying particular overt acts. But to require that an indictment for *conspiracy* to defraud should show on its face statements of fact showing that the fraud had been accomplished is to lose sight of the nature of the offense intended to be charged.

We think that the error into which the learned judge fell in his first opinion was due to the misconceived idea that Section 1014 R. S. is the only provision of law authorizing the removal of persons charged with crime from one jurisdiction of the United States to another, and that in order to make it cover the case of an indictment, the method of procedure for persons arrested after indictment had to be made to conform to the method of procedure in the state for persons arrested before indictment. He says (Rec., 46):

> "That the mode of proceeding in such cases is precisely the same, whether there is an indictment or no indictment." * * * (Rec., 48.) "The

existence of an indictment in another jurisdiction has no bearing upon the application of this statute to proceedings for commitment."

This conclusion is based (Rec., 47) upon a statement of Justice Curtis in *U. S.* v. *Rundlett* (2 Curtis, 41), a case of arrest before indictment under the provisions of the 33rd section of the Judiciary Act (Sec. 1014 R. S.), where discussing that procedure, the justice says:

> "My opinion is that it was the intention of Congress by these words to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings for similar purposes by the laws of the state where the proceeding should take place, * * * the prisoner is not only to be arrested and imprisoned, but bailed agreeable to the usual mode of process in the state."

If it be conceded for the purpose of applying the above *dicta* to this case that the 33rd section of the Judiciary Act (Sec. 1014 R. S.) covered the case of arrest and removal on indictment, let us see what is the practice in New York in such cases. Judge BROWN in his first opinion says (Rec., 47):

> "The New York Revised Statutes (1828) declare, Vol. 2, p. 708: 'After the examination of the prisoner is completed, his witnesses, if he shall have any, shall be sworn and examined, and he may have the assistance of counsel in such examination.'"

But the provisions above quoted are taken bodily from the subdivision of the statutes of that state relating to proceedings on "arrest before indictment."

N. Y. Crim. Code, Sec. 201.

In truth the present New York statutes specifically provide that the defendant may be arrested in any county in the State of New York on bench warrant issued on indict-

ment from another county, and no provision is made for any preliminary examination whatever, but the defendant is required to give bail or to be carried to the court where the indictment is found, for trial.

N. Y. Crim. Code, Secs. 300-303.

The learned judge recognizes that to be the state law in New York as to procedure on indictment (Rec., 48).

The construction placed upon section 914 R. S. as to conforming to state practice and procedure in civil common law cases is, that a selection of the state procedure, applied under similar circumstances in the state courts, is what was intended.

And if that provision of Section 1014 in regard to conforming to state practice is applicable to indictments, it would slowly follow that we had the right to invoke the practice in that state applicable to arrest after indictment, and not that applying to arrest *before* indictment.

Section 1,014, R. S., was not intended to cover every removable case, nor does the procedure there exhaust the remedies at the disposal of the Federal courts.

A failure to appreciate this has led to many incongruous decisions. Judge BROWN himself notices (Rec., 48), that:

> "Section 1014 R. S., moreover, plainly contemplates the examination of witnesses and provides for a return of recognizances for their appearance to testify in the case."

That statute too provides expressly only for cases which can be bailed "for trial" or removed to a district "where the trial is to be had."

Where is the remedy in this statute for bringing a defendant to justice where he breaks his bail at any stage of the proceedings after trial?

In Thompson's case in 1888 Judge Montgomery in the District of Columbia discharged the defendant because he held that Section 1014 R. S. applied solely to cases where no trial had been had.

That statute too does not in terms apply to a convict who breaks jail pending the execution of his sentence and who may be arrested in another district. But as held by the courts there are ample provisions of the statutes outside of Section 1014 for the removal of defendants and enforcement of the penalties of the law in such cases.

In re Christian, 82 F. R., 885.
Corbin v. *Boyes*, 34 F. R., 699.

This brings up for consideration the necessity for the enactment of the 33rd section of the Judiciary Act (Sec. 1014 R. S.) and the function it was intended to perform and brings us to:

AN ANALYSIS AND REVIEW OF THE LAWS APPLICABLE TO THE REMOVAL OF PERSONS CHARGED WITH CRIME IN ONE DISTRICT WHO ARE ARRESTED IN ANOTHER.

Congress has never enacted a general code of criminal procedure and the courts of the United States unless controlled by some express statute proceed according to the course of the common law as recognized and existing in America at the time of the adoption of the Constitution. When Congress enacted a code of criminal laws and created courts which it invested with jurisdiction to enforce those laws, it was intended that they should command all

the machinery of the common law for making effective that jurisdiction.

U. S. v. *Reed*, 12 How., 361.
U. S. v. *Maxwell*, 3 Dill., 278.
U. S. v. *Nye*, 4 Fed. Rep., 890.

COMMON LAW PROCEDURE *before* INDICTMENT.

At common law the method of dealing with a person who, having committed a crime in one county is found in another, depended largely upon the fact as to whether the proceeding instituted against him was before or after indictment.

The proceeding on complaint before indictment where bail is not given is thus stated by Chitty:

> "At common law if A committed a felony in the county of B and then went into the county of C, upon information to a justice of the peace for the county of C he might issue his warrant to apprehend him and take his examination and commit him to gaol in the county of C, from whence he might be removed by *habeas corpus* to the county of B for his trial."
>
> Chitty Crim. Law, * p. 35 and * p. 63, I Hale, 580.

This case is instructive as showing that the writ of *habeas corpus* was in common use for accomplishing the removal of persons charged with crime from one county to another for trial. In such cases the justice could also take bail.

2 Hawk. P. Crown, 183, Sec. 8.

Because of the fact that the warrants of a justice of the peace did not run out of his county the practice sprang

up of taking warrants issued by a justice of the peace of one county to a justice in the county in which the defendant was found, and having the latter endorse it for execution in that county. This practice applied only to justices of the peace and was authorized by statute of 23 Geo., II, c. 26, Sec. 12, and 24 Geo., II, c. 55.

Chitty Crim. Law * p. 45.

COMMON LAW PROCEDURE *after* INDICTMENT FOUND.

There were two well recognized modes of procedure for the arrest of defendants indicted, and securing their appearance at the court for trial.

1st. Mr. Chitty says:

> "At common law the usual mode of bringing a defendant into court upon an indictment found against him when it was not considered necessary to pursue him to outlawry was by a writ of capias."
>
> Chitty Crim. Law, * p. 339.

For the accomplishment of that purpose says Mr. Chitty:

> "The warrant of a judge of the Kings Bench extended over the whole realm."
>
> Chitty Crim. Law, * p. 342 and * p. 45.

2nd. The other method which might be pursued at common law is thus stated by Mr. Chitty:

> "When the assize and sessions are over the clerk of assize and clerk of the peace, respectively, will, on application of the prosecutor, grant a certificate of the indictment having been found, upon which any judge of the Kings Bench or justice of the peace of the proper county will grant a warrant for appre-

hending the defendant, and will oblige him to enter into recognizance to answer, or for want of sureties will commit him."

Chitty Crim. Law, * p. 340.

These two methods of procedure after indictment found were concurrent remedies.

Idem, * p. 341.

There was no question of a want of adequate machinery in the common law courts vested with jurisdiction over offenders to secure and subject the person of the defendant to the judgment of the court.

"As there can be no inquiry respecting offenses, without the presence of the party, whenever the power is intrusted of determining the former there must also be authority to compel the latter."

Chitty Crim Law, * p. 338.

Com. Dig. Process, A. I.

At common law there was never any question of a want of process in arresting and returning persons *convicted* of crime to the proper authority to have their just punishment meted out to them, it required no process. Mr. Chitty says:

"At common law where there has been a judgment of outlawry against an escaped defendant it is the same as a conviction, and *any* person may arrest him in order to bring him to execution."

Chitty Crim Law, * p. 365-6.

4 Bla. Com., 320.

It is very clear from the authorities hereinbefore quoted that the courts of the United States must have at their command to be exercised within the United States all the remedial processes known to common law usage, unless

the same has either expressly or impliedly been taken away by some statute.

Chief Justice Marshall, in several of the decisions rendered by him in the proceedings against Aaron Burr pointed out the fact that the 33rd section of the Judiciary Act (embodied in Sec. 1,014, R. S.) did not cover the entire subject or comprehend all the remedies at command of the courts of the United States in the matter of arrest and bringing defendant to trial or judgment. The point was made before him that no express authority was given the court "as a court" by the 33rd section of the Judiciary Act to commit a person for trial. Addressing himself to this, he said:

> "This power is necessarily exercised by courts in discharge of their functions and it seems not to have been expressly given, because it is implied in the duties which a court must perform, and the judicial act contemplates it in this light. They have cognizance of all crimes against the United States."
>
> *U. S.* v. *Burr*, 25 F. Cases, 14692 b.

In another proceeding against Burr the same learned judge said:

> "The question now before the court is whether bail is *demandable* from a person in actual custody against whom an indictment for a misdemeanor has been found. * * * A court of the United States under Section 4 of the Judiciary Act (Sec. 716 R. S.) has power to devise the process for bringing any person before it who has committed an offense of which it has cognizance. The limitation on this power is that the process shall be agreeable to the principles and usages of law. * * *
>
> Whenever by the laws of the United States an offender is to be arrested the process of arrest employed in the state shall be pursued; *but an arrest is positively enjoined for any offense against the United States.* * * *

> *This section (33rd Sec. Judiciary Act), it is true does not respect the process upon an indictment.* But the law would be inconsistent with itself if it required a magistrate to arrest for any offense against the United States, if it commanded him on every arrest to commit or to bail and yet refused a capias and permitted the same offender to go at large as soon as an indictment was found against him."
>
> *U. S.* v. *Burr,* 25 Fed. Cases, 14,694.

Again he said:

> "Upon general principles of law it would seem to me that in all cases where the judgment is to affect the person, the person ought to be held subject to that judgment. * * * Now reasoning by analogy from civil suits to criminal prosecutions it would seem not unreasonable *where there is such evidence* as an *indictment* found by a grand jury, to use such process as will hold the person of the accused within the power of the court, or furnish security that the person will be brought forward to satisfy the judgment of the court."
>
> *U. S.* v. *Burr,* 25 F. Cases, 14,694.

We thus see that it was the view of this great expounder of the jurisprudence of the United States:

1st. That the statutes required an arrest in all cases of crime committed irrespective of whether the person could be disposed of in the method prescribed by Section 1014 R. S. or not.

2nd. That Section 716 R. S. confers upon the courts of the United States the power to frame the proper process to bring the person arrested to trial or satisfaction of judgment.

3rd. That the common law processes, that is, processes issued "agreeably to the principles and usages of law" are at the command of the United States Courts for that purpose.

4th. That a valid indictment is sufficient evidence in itself to make bail demandable.

5th. That on indictment found, the court had the power not only to frame a process which would bring a defendant to trial, but to frame a process which would bring the defendant forward to satisfy its *judgment or sentence.*

It would seem a work of supererogation to attempt to show otherwise than by the views of this eminent jurist that the provisions of Section 1014 R. S. relative to cases to be tried were not intended to supersede the common law remedies for bringing criminals to punishment in cases in which removals are not expressly provided for by that section.

It is a well settled rule of statutory construction that a new statute creating remedies is not to be construed as repealing by implication former statutes or as taking away old remedies unless the new law so far covers the subject-matter as to leave no case formerly provided for without a remedy under the new law.

Hess v. *Reynolds,* 113 U. S., 73.
Railroad v. *Bates,* 119 U. S., 464.

The real necessity for the passage of the 33rd section of the Judiciary Act was not to supply a remedy, because that was already supplied by the common law, but it was to supply committing magistrates under the Federal system. This made it necessary to confer by express statute the power of committing magistrates under the new system upon the several judges and justices of the peace of the respective states. Commissioners were created by a later act.

It was also provided that:

> "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section (1014) to arrest and imprison offenders."
>
> Section 1015 R. S.

Accepting the conclusion reached by Justice Marshall that it was intended by Congress by Section 1015 R. S. (last part of Sec. 33 of Judiciary Act amended by Act of 1793), to confer upon the judicial officers mentioned in the first part of Section 1014 R. S. the general powers of committing magistrates as to all crimes against the United States, we do not have to look to the provisions of the last part of Section 1014 R. S. for process of removal in cases arising on indictment. The process of the common law furnishes a complete remedy as we have already seen, viz.:

We get a certified copy of the indictment from the clerk of the court where the indictment is found. We take this to the magistrate in the district where the defendant is found. He issues his warrant. The defendant is brought before him. He accepts bail for his appearance at the court having cognizance of the offense or commits the defendant to jail as the case may be.

Chitty Crim. Law, * p. 341.

Being so committed, the prisoner, at common law would have been removed by writ of *habeas corpus* as we have seen to the court having cognizance of the offense. While under 716 R. S. the judge of the district where the defendant is committed may forthwith frame and issue a warrant for that purpose.

There is such absolute harmony between this method of removal on certificate of indictment at common law and the method of removal provided in the last part of Section 1014 R. S. that some of the courts have of late overlooked the fact pointed out by Justice Marshall that the 33rd section of the Judiciary Act does not "respect the process upon an indictment," and they have failed to see that we have all along been applying to such cases the process of arrest and removal on certificate of indictment provided by the common law.

It may be said that if this method of removal on indictment is operative as a common law remedy, that the other method of arrest by capias wherever the defendant may be found in the United States and carrying him directly to the court issuing the process ought also to be still effective. (2nd Opinions Atty. General, 564.) Undoubtedly this is still true in proper cases. It must be considered, however, that under our practice such a warrant would be executed in the state where the offender is found by the marshal of that district (788 R. S.). That the defendant would have the constitutional as well as statutory right (Sec. 1015 R. S.) in bailable cases to apply by *habeas corpus* to give bail in bailable cases in the district of his arrest for his appearance where indicted. So that as a practical question it amounts to the same thing.

Policy of the Law.

When the vast amount of oral and documentary evidence, let into the record after the case was returned by the judge to the commissioner for hearing on the evidence is considered, and the further fact is considered that even with the four defendants arrested in the same

district and proceeded against at the same time a year and four months have elapsed since the taking of evidence in this second hearing was commenced, and the further fact that if the five defendants in this case had each fled to a different district and the same requirement was had as to making out the case on the evidence, and the impossibility of having the evidence at two places at once, it will readily be seen that such a construction of the law will annihilate the remedial powers of the courts of the United States in the suppression of crime.

Where the defendants take refuge in other states, the prosecution under such a practice must necessarily fail in most cases. Any theory of our removal statutes which, advanced for the first time within the past six years, would lead to such a result should be viewed with a critic's eye. The greater intercourse between the peoples of the states now than formerly makes the preservation of these remedial processes the more important.

(E.)

REMOVAL WARRANT JUSTIFIED ON THE COMPLAINT AND EVIDENCE IRRESPECTIVE OF THE VALIDITY OF THE INDICTMENT.

THE SECOND HEARING.

It is claimed by the defendant's counsel that his Honor Judge Brown had no jurisdiction to send the case back to the commissioner for a second hearing or more evidence, but was bound to discharge defendants if the case as first sent up by the commissioner was insufficient.

Of course if the case as first sent up by the commissioner was sufficient in itself to authorize the warrant, the final action of Judge Brown in issuing the warrant on the whole record must be sustained.

But if it be conceded for the purpose of the argument that the case as first sent up was not sufficient, yet as was stated by Judge SHIPMAN in a case in New York:

> "If the prisoner is discharged, he may be again arrested, and on sufficient evidence may be committed. * * * In none of these proceedings of the commissioner are his orders in the nature of a final judgment of a court of record."
>
> *In re* Martin, 5 Blatch., 303.

If there was a fatal defect in the proceedings before him as they stood, and yet a suggestion in the record of the commission of a crime, it was entirely competent for the judge with the powers vested in him by Section 1014 to himself enter into further investigation or refer the

case to a commissioner for additional evidence on the complaint.

The fact that no new warrant was issued by the commissioner and re-arrest made is immaterial. In answer to a similar point made in the case of Burr, Chief Justice MARSHALL said:

> "To issue the capias to take into custody a person actually in custody would be an idle ceremony. In such a case the order of court very properly supplies the place of a capias."
>
> *U. S.* v. *Burr,* Fed. Cases, Vol. 25, No. 14,694.

However this may be, the record shows that there *was* a second hearing before the commissioner in this case, upon a sworn complaint, with the defendants present and represented by counsel; that evidence was introduced by the prosecution and by the defense, and that there was a finding of probable cause of guilt made by the commissioner upon this evidence.

This alone was sufficient to justify the warrant of removal.

One of the earliest cases of removal from one district to another under the provisions of the 33d section of the Judiciary Act embodied in Section 1014 R. S. was the removal of Burr and Blennerhasset in 1807 from the District of Virginia on the order of Chief Justice Marshall to the District of Ohio for trial. The removal was on simply a written charge preferred by the United States attorney supported by oral and documentary evidence. They were required to give bail to answer such indictments as might thereafter be found.

> *U. S.* v. *Burr,* Fed. Cases, 14,694 A., 25 F. C., pp. 201, 202, 207.

To like effect is

> *In re Burkhart,* 33 F. R., 25.

Whatever may be said for or against the document offered in evidence as to its effectiveness as an indictment, it was certainly sufficient in form to put the defendants on notice of the nature of the charge, for the purposes of a preliminary examination to hold to bail. So also was the affidavit of the assistant district attorney upon which the warrant of arrest issued. And when such a charge is backed up by the sworn testimony of the witnesses delivered before the commissioner and taken down by a stenographer in the presence of the defendants, and when they were given an adjournment of a month and a half after the government's case was closed to get up testimony to meet the government's case, I submit that even if the original affidavit were technically defective and the indictment be reduced to a simple charge made by the prosecuting officer, that for any crime shown to have been committed, by the sworn testimony, the commissioner may hold to bail or commit for trial to the court having cognizance of the offense.

Mr. Bishop says:

> "In England the judges of the courts which are entrusted with the conservation of the peace, are authorized to issue warrants for the arrest, also to commit people already before them, when the occasion for the commitment judicially appears. And the like power in many of our states is held to belong as of right to our judges."
>
> 1 Bishop Crim. Proc., Sec. 715.

It was on this principle that Justice Marshall held Aaron Burr for trial on an indictment, although he had not been arrested on capias nor had any preliminary examination.

> *U. S.* v. *Burr*, Fed. Case, 14694, 25 Vol., p. 189.

In a contempt case while adverting to the fact that it was usual to commence such proceeding by affidavit and rule the Supreme Court of the United States said:

> "If the appellant was entitled of right to purge himself under oath of the contempt, yet it is sufficient that he was informed of the nature of the charges against him by the testimony of a witness taken down by a sworn stenographer at the preliminary examination and that he was present at the hearing of the contempt, was represented by counsel, testified under oath in his own behalf and had full opportunity to make his defense."
>
> *In re* Savin, 131 U. S., 267-280.

In Georgia the rule is that—

> "A court of inquiry may commit for a different offense than that stated in the warrant if the evidence requires it."
>
> Code Ga., of 1895, Sec. 913.

This is in accordance with the common law as stated by Mr. Bishop, and I believe the rule is general. It was held to be substantially the rule in New York.

U. S. v. *Price,* 84 F. R., 636.

The commissioner having found probable cause of guilt, the district judge could not properly have substituted his judgment for that of the commissioner on the weight of the evidence.

Ornelas v. *Ruiz,* 161 U. S., 511.
Bryant v. *United States,* 167 U. S., 105.

STATUTE OF LIMITATIONS—FUGITIVES FROM JUSTICE.

It is claimed by defendants' counsel, however, that if the present indictment is in any way so defective as to make it fail, that no new indictment can be found, because, as they claim, the statute of limitations has run; and that, therefore, the court will, in this case, go further than in ordinary cases and brush aside the indictment found in December, 1899, for alleged technical defects, in order to hold that the three years' limitation expired in July, 1900, on the last alleged overt act, the payment of money on the contracts in July, 1897.

Defendants' counsel say:

> "In this case the defendants never fled from the justice of the state or United States, they have always been in the United States and subject to the process of the United States."

Now, we submit that the definition of a fugitive from justice in Section 1045 R. S. has relation to the jurisdiction in which the indictment referred to in Section 1045 R. S., is found. The jurisdiction of the crime in the district as defined by the 6th amendment to the Constitution. He may be a fugitive from justice in the sense of 1045 R. S. in fleeing from one district or state to another, although he may never go out of the United States.

> *U. S.* v. *White*, 5 Cranch, C. C., 116 Fed. Case, 16677, Vol. 28.

In the Streep case, Mr. Justice GRAY, for the court, said:

> "And there can be no doubt that in this respect U. S. Rev. Stat., Sec. *1045, must receive* the same *construction* that has been given to Sec. 5278 by this

court, saying: 'To be a fugitive from justice in the sense of the Act of Congress regulating the subject under consideration, it is not *necessary* that the party should have left the state in which the crime is alleged to have been committed after *indictment*, or for the *purpose of avoiding a prosecution* anticipated or begun, *but simply* that having within a *state* committed that which by its laws constitute a crime, when he is sought to be subjected to its criminal process to answer for his offense he has left its jurisdiction and is found within the territory of another."

Streep v. *United States*, 106 U. S., 134.

"Nor is it necessary in order to satisfy the terms of the statute now before us (1045 R. S.) that the fugitive should have the intention of fleeing from justice as administered by any particular court or system of courts having criminal jurisdiction over the territory where the act supposed to have been criminal was committed."

Idem.

"Proof of a specific intent to avoid either could seldom be had; and to make it an essential requisite would often defeat the whole object of the provision."

Idem.

Now, it is a most persuasive fact that following the return of the indictment in the District Court of the United States for the Southern District of Georgia, on December 8, 1899, that every one of these defendants collected in the City of New York, under the shadow of the wing of the attorneys who had been and were then defending their alleged co-conspirator, Captain Carter, who immediately appeared for them and commenced to resist by every legal means a return to the jurisdiction where the crime is charged to have been committed.

The defendants have offered no evidence to show that they were not fugitives from justice.

They cannot by demurrer, much less by bare suggestion without evidence, have the court assume that they are not such fugitives.

U. S. v. *Cook,* 17 Wall., 168.

(F.)

THE HABEAS CORPUS PROCEEDINGS.

Limit of Inquiry.

That the grand jury was illegally constituted will not be inquired of by *habeas corpus.*

In re Harding, 120 U. S., 782.

Alleged irregularities committed by a commissioner who had jurisdiction of the person and subject-matter will not be inquired into on *habeas corpus.*

Stevens v. *Fuller,* 136 U. S., 468.
Ornelas v. *Ruiz,* 161 U. S., 502.

In Horner's case Mr. Justice Blatchford, delivering the opinion of this court, said:

> "The commissioner had jurisdiction of the subject-matter involved and of the person of Horner, and the grand jury would have like jurisdiction. * * * If an inferior court or magistrate of the United States has jurisdiction a superior court of the United States will not interfere by *habeas corpus.*"

Horner v. *United States,* 143 U. S., 570-578.

If a case is in process of adjudication in a court of concurrent jurisdiction, the reasons for non-interference would be still more cogent.

It appearing upon the face of the petition for habeas corpus that the case was in process of adjudication in a court of concurrent jurisdiction, the Circuit Court should have refused to entertain the question and declined to allow appeal and supersedeas.

Has a district or circuit judge or District or Circuit Court a discretion in certain cases to refuse to entertain a petition of habeas corpus and to refuse the allowance of an appeal and supersedeas from a refusal to entertain such application?

STATUTES BEARING ON THE QUESTION.

(a.) "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus.*"

751 R. S.

(b.) "The several justices and judges of the said courts within their respective jurisdictions shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty."

752 R. S.

(c.) "Application for writ of *habeas corpus* shall be made to the court or justice or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained," etc., etc.

754 R. S.

(d.) "The court or justice or judge to whom such application is made *shall* forthwith award a writ of *habeas corpus, unless it appears from* the petition itself that the *party is not entitled* thereto. The writ shall be directed to the person in whose custody the party is detained."

755 R. S.

APPEALS TO CIRCUIT COURT OF APPEALS.

(e.) "From the final decision of any court, justice or judge inferior to the Circuit Court, upon an application for a writ of *habeas corpus,* or upon such writ when issued, an appeal may be taken to the Circuit Court for the district in which the cause is heard.

(1.) In the case of any person alleged to be restrained of his liberty in violation of the constitution or of any law or treaty of the United States.

(2.) In case of any prisoner who being a subject or citizen of a foreign state and domiciled therein is committed," etc., etc.

763 R. S.

The appellate jurisdiction under the above section now belongs to the Circuit Court of Appeals under Sections 4 to 6 of the Act of March 3, 1891.

U. S. v. *Fowkes,* 53 F. R., 13.

Lau Ow Bew v. *U. S.,* 144 U. S., 47.

APPEALS TO SUPREME COURT.

(f.) "From the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described in the preceding (763) section."

764 R. S.

But unless the construction of the constitution or a treaty or constitutionality of any law of the

United States is involved, the decision of the Circuit Court of Appeals is final, and such decision can only be reviewed in Supreme Court by *certiorari.*

Lau Ow Bow v. *United States,* 144 U. S., 47.

In the excepted cases, construction of constitution, etc., appeal lies direct from the District and Circuit Courts to the Supreme Court under Act of March 3, 1891.

Boske v. *Comingore,* 177 U. S., 459.

And in such cases the Circuit Court of Appeals may decline to take jurisdiction.

Carter v. *Roberts,* 177 U. S., 496.

PEREMPTORY PROVISIONS.

It will be observed that the language of 755 R. S., (d) above, appears to be peremptory:

> "The *court* or *justice* or *judge* to whom such application is made *shall* forthwith award a writ of *habeas corpus,* unless it appears from the petition itself that the party is not entitled thereto."

It will be observed, too, that it applies to the Supreme Court, as well as to the Circuit and District Courts. It follows, therefore, that whatever right any one of these courts may have *to refuse to entertain* the application, at all, must belong to each and all of them. Let us premise, also, that there are three ways in which a court may treat a petition presented to it.

(1.) It may refuse to entertain jurisdiction of the application at all. Such a case may occur where there is a fatal defect or irregularity in the time or manner of its presentation, or facts made known to the court at the threshold showing that it ought not to consider the ques-

tions presented on the merits, as where the question is then in process of adjudication in regular course before a court of inferior or concurrent juisdiction.

(2.) It may entertain the application, but upon consideration of the petition itself may determine that the party is not entitled to the writ, on the merits of the case stated in the petition.

(3.) It may award the writ and upon full hearing may grant or refuse a discharge as the case may be.

On principle and authority, an appeal does not lie in the first case because it would indirectly accomplish an interference which the refusal to take jurisdiction, as directed by law, was intended to avoid.

Illustrations of the doctrine stated in the first class of cases:

Mirzan's Case.

Mirzan was convicted before our minister in Egypt and was serving out his sentence in the penitentiary at Albany, N. Y. A *motion* was made *for leave to file a petition* for habeas corpus directly to the Supreme Court. Chief Justice White said:

> "This motion is denied. As since the Act of March 3, 1885, 23 Stat. L., 437, an appeal lies to this court from judgments of the Circuit Courts in habeas corpus cases, this court will not issue such writ, *even if it has the power*—about which it is unnecessary to express an opinion—in cases where it may as well be done in the proper Circuit Court, if there are no special circumstances in the cases making direct action or intervention by this court necessary or expedient. In this case there are no such special circumstances, and the application may as well be made to the Circuit Court for the Northern District of New York as here. *Our right to exercise*

this discretion is shown by the principles on which the decisions in *ex parte* Royall Nos. 1 and 2, 117 U. S., 241, and *ex parte* Royall, 117 U. S., 254. This practice was suggested by us and followed in *Wales* v. *Whitney*, 114 U. S., 564."

Re Mirzan, 119 U. S., 584.

This action of the Supreme Court is totally inconsistent with the view that 755 R. S. requires imperatively that the court shall take jurisdiction of the application unless it appears on the face of the petition that the petitioner is not entitled on the merits to the writ. It shows that the court may require the defendant to exhaust other remedies before the court will even entertain jurisdiction of the application. And as we have seen, the statute is no more imperative in regard to the Circuit and District Courts than it is in regard to the Supreme Court.

The Lancaster Case.

Lancaster *et al.*, under Secs. 5,508, 5,509, R. S., were indicted in the United States Circuit Court for the Southern District of Georgia for conspiracy to deprive a citizen of the United States of a constitutional right, and for murder committed in pursuance of such conspiracy. They were arrested and held in jail in the custody of the marshal to await trial. A motion was made in the Supreme Court *for leave to file a petition* for writ of habeas corpus. Chief Justice Fuller said:

"The petitioners were indicted under Sections 5,508 and 5,509 of the Revised Statutes, on the 20th day of November, 1890, in the Circuit Court for the Southern District of Georgia, and have been taken into custody. *They have not invoked the action of the Circuit Court* upon the sufficiency of the indict-

ment by a motion to quash or otherwise, but ask leave to file in this court a petition for a writ of habeas corpus upon the ground that the matters and things set forth and charged do not constitute any offense under the laws of the United States or cognizable in the Circuit Court, and that for other reasons the indictment cannot be sustained. *In this posture* of the case we must decline to interfere. The application for leave to file the petition is denied."

Re Lancaster, 137 U. S., 393.

Observe that this was a case in which, under 755 R. S., the Supreme Court was imperatively commanded to issue the writ unless it appeared by the petition itself that the petitioner was not entitled to the writ, and yet the Supreme Court refused to look into the merits of the case solely because the case was in the jurisdiction of the lower court, and the petitioner had not exhausted his remedies there.

Royall's Case.

Royall was indicted in a state court in Virginia, and held under arrest to await trial. He applied to the United States Circuit Court in Virginia for habeas corpus; the writ was granted, but on final hearing was dismissed *for want of jurisdiction*. He appealed to the Supreme Court. That court held that the Circuit Court was in error in holding that it was without jurisdiction, but sustained the dismissal on the following ground, as stated by Justice Harlan:

"The Circuit Court has discretion whether it will discharge him upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case

the Circuit Court has still a discretion whether under all the circumstances then existing, the accused if convicted shall be put to his writ of error from the highest court of the state or whether it will proceed by habeas corpus summarily to determine whether the peitioner is restrained of his liberty in violation of the constitution of the United States."

Ex parte Royall, 117 U. S., 241.

The reason of this rule is further stated by Justice Harlan, as follows:

"Nor do their circumstances as detailed in the petitions suggest any reason why the state court of original jurisdiction may not without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The Circuit Court was not at liberty, under the circumstances disclosed to presume that the decisions of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court upon which is clearly conferred the power to decide ultimately and finally all cases arising under the constitution and laws of the United States." *Idem.*

For similar reasons the petition of Royall, directed to the Supreme Court for writ of habeas corpus, was refused.

Re Royall, 117 U. S., 254.

Let it be observed that the Supreme Court stated that they arrived at the conclusion reached in cases of Mirzan and Lancaster, who were held on federal process, on the principles announced in the case of Royall, who was held on state court process.

Mirzan's case (*supra*).

Horner's Case.

Horner had been committed in the Southern District of New York by the commissioner to await the action of a grand jury in that district. He applied to the Circuit Court for writ of habeas corpus. The case was heard on return of the writ and dismissed, and the case appealed to the Supreme Court. Mr. Justice Blatchford said:

> "The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await action of a grand jury. His case is in the regular course of criminal adjudication. It is not proper for this court on appeal, nor was it proper for the Circuit Court on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery. The commissioner had jurisdiction of the subject-matter involved and of the person of Horner, and the grand jury would have like jurisdiction. * * * If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by habeas corpus."
>
> *Horner* v. *U. S.*, 143 U. S., 570-578.

In *Wood* v. *Brush*, the reason for non-interference is stated by Mr. Justice Harlan thus:

> "The Circuit Court *might well have forborne to act* until this question had been definitely determined, either in the highest court of New York or in this court upon a writ of error sued out by the appellant. While the courts of the United States have power upon habeas corpus to inquire into the cause of the detention of any one claiming to be restrained of his liberty in violation of the constitution or laws, or treaties of the United States, *it was not intended by Congress that they should by writs of habeas corpus obstruct the ordinary administration of the criminal laws* of the states through their own tribunals."
>
> *Wood* v. *Brush*, 140 U. S., 278-390, 370-1.

The state courts are prohibited by Section 751, R. S., from proceeding pending hearing and appeals on habeas corpus before United States courts.

Re Jugiro, 140 U. S., 291.

If the Circuit Court *must entertain* and pass upon the merits of an application for habeas corpus, and if this gives the relator an absolute right of appeal to the Supreme Court on a denial of the application, it necessarily follows that "the ordinary administration of the criminal laws of the United States through their own tribunals can be interfered with" and absolutely "stayed" for an indefinite time by prosecuting successive writs of habeas corpus before the several judges, justices and courts of the United States and taking appeals thereon. Any such result is, however, in the teeth of the statement of the Supreme Court above quoted that "it was not so intended by Congress."

It is submitted that the remedy is suggested by the Supreme Court in the Wood case (*supra*), when it said:

> "The Circuit Court might well have forborne to act until this question had been definitely determined either in the highest court of New York or in this court on a writ of error sued out by the appellant."

It is submitted that the Supreme Court meant just what it said, that the Circuit Court had the right to refuse to take any action, the right to refuse to take jurisdiction of the application.

Cuddy's Case.

Cuddy applied to the District Court of the United States for a writ of habeas corpus setting forth that he was illegally held in custody of the marshal in violation of the laws of the United States, under sentence for alleged contempt of court. His application was denied. He appealed to the Supreme Court. His appeal was not sustained. He then applied to the Circuit Court on the same record, adding some facts known to him before, but omitted in the former petition. Mr. Justice Field held that he could not thus renew his application without obtaining the permission of the Supreme Court. That the second petition should not be heard. Mr. Justice Field said:

> "If he can renew it on another record which may also be in some other particular defective, and so on indefinitely whenever he fails on appeal, it is plain that the writ may often become an instrument of oppression instead of a means of relieving one from an unjust and illegal imprisonment."
>
> *Re Cuddy*, 40 F. R., 52.

It will be observed that Justice Field in Cuddy's case awarded the writ, but after hearing, came to the conclusion that *he should not have entertained the application* at all. It will be observed, too, that the first application had been made to the District Court, and that the second application was made to the Circuit Court, and yet the fact that a similar application had been made to the District Court was decisive on that record.

Simmons Case.

Simmons, in a trial in the Circuit Court for the Eastern District of New York, before Judge Benedict, was on the record sentenced by the latter and placed in custody. He applied for writ of habeas corpus to Judge Wallace in the same court on the same record. The petition was refused by Judge Wallace, who said:

> "That decision, until it is reversed upon a review in this court, ought to be authoritative; otherwise, there might be conflicting adjudications upon the same question in the same court."
>
> *Re* Simmons, 45 F. R., 241.

This case is a very suggestive one.

The act creating the court of appeals took away all appellate jurisdiction from the Circuit Court. As the law now stands, the jurisdiction of the District Court for the Southern District of New York in these matters is as plenary as that of the Circuit Court. His Honor, Judge Brown, having on the record before him issued a warrant directing the marshal to remove certain defendants to Georgia, is it consonant with the comity existing between judges and courts of concurrent jurisdiction in the same district that one should reverse the other? Was it really intended that this should be so? If so, then application after application can be made until all the judges and courts are exhausted, and endless delays obtained by appeals, and then the proceedings be gone over again *ad libitum*.

Has not the decision of the Supreme Court in the Mirzan case (*supra*), and the creation of the Court of Appeals cleared the way for the adjustment of these

questions of conflicting jurisdiction on a rational basis? It would seem so.

Since Greene and the Gaynors are being removed on a warrant issued by the Judge of the District Court of the Southern District of New York, for trial before the District Court in Georgia, it is clear that their cases "were in the regular course of criminal adjudication," as in Horner's case (*supra*); that every question which can be made on habeas corpus can be made in the trial court in Georgia, and carried to the Supreme Court from there, and if the Supreme Court of the United States would not interfere in advance of trial, that no judge or court exercising concurrent jurisdiction with Judge Brown ought to interfere.

Lancaster's case, (*supra*).

Special Circumstances.

It is not contended here but that special circumstances may exist which may sway the discretion of the judge in some cases in favor of the granting of the writ before trial on indictment. But those cases are well defined. In the main they are cases as pointed out by the Supreme Court where some officer of the government is being interfered with in or on account of the performance of his duty.

U. S. v. *Eno,* 155 U. S., 89.
Re Neagle, 135 U. S., 1.
Whitten v. *Tomlinson,* 160 U. S., 242.

The case of *Rose* v. *Roberts* is easily distinguished. In that case Carter was not being removed to another state *for trial,* but was about to be removed to a distant

state for execution of a sentence of imprisonment. Application for *certiorari* was then pending before the Supreme Court, and the Circuit Court of Appeals exercised a discretion in withholding the mandate because "relator would be remediless."

Rose v. *Roberts*, 99 F. R., 952.

DURRANT'S CASE.

It is not overlooked that in Durrant's case, in which the judge was morally satisfied that the merits of the petition for habeas corpus had already been passed on by the Supreme Court and that it was presented for the purpose of obtaining a second appeal for delay only, that Judge De Haven said:

> "The right to present the petition is absolute and the duty of the court to either grant or refuse the writ is one which the court has no lawful right to refuse to discharge."

And that he then cuts the *Gordian knot* by holding that:

> "When it manifestly appears to the court that the application for the writ is entirely destitute of a merit, and that the effect of allowing an appeal from its final judgment in the proceeding will only result in the obstructing of the execution of the laws of the state, then the court may properly refuse to entertain order giving its consent to such appeal."
>
> *Re* Durrant, 84 F. R., 318.

The judge in reaching this conclusion takes issue with the conclusion of Judge Lacombe in the Jugiro case (44 F. R., 754). A comparison, however, of the provisions of the statute *relating to appeals* will show that they *are as much and no more peremptory* than are those relating

to *hearing the application* for the writ. It would seem that Judge De Haven, by having improvidently heard the application for the writ on its merits, instead of refusing to entertain it, involved himself in false logic in order to avoid a result clearly not contemplated by the law.

The Jugiro Case.

His Honor, Judge Lacombe, in the Jugiro case, *had entertained a second application for habeas corpus,* and *had denied* the application and *an order of denial had been duly entered.* On presentation of a petition for appeal, he held the right of appeal to be an absolute one under the statute. The court had denied the application by a general order covering the case on its merits before objection to the exercise of jurisdiction was made, and the right of appeal became operative by virtue of the posture of the case. He has applied that ruling to the case at bar, although in this case he refused the petition at the threshold.

Under the decision of Justice Field in Cuddy's case, however, the court in the Jugiro case might well, at the threshold, have *refused to hear* a second application or to entertain jurisdiction of it, unless the applicant obtained permission of the Supreme Court. Besides, it was not a case in regular process of adjudication, but had reached final judgment.

Re Jugiro, 44 F. R., 754.

PUBLIC POLICY.

The defendants do not lose any substantial right by a refusal of the court, by habeas corpus, to interfere before trial. The same august tribunal, the Supreme Court of the United States, will be the final arbiter on all questions, whether they go up from New York or Georgia. The same public policy which encourages freedom of intercourse and interchange of traffic, and close commercial relations between the states, and gives the citizens of one state equal rights in carrying on business and contracts in another state, demands that perpetrators of frauds committed in a state who flee for refuge to other states should be brought to quick trial. In the case at bar four of the government's witnesses have died since the court martial trial. Nearly two years have already been consumed by the defense in fighting removal by technical objections.

The Supreme Court has said that Congress never intended by these acts to interfere with the ordinary proceedings in the courts in advance of final judgment, and I submit that it is the duty of the courts to so construe the law.

November 4, 1901.

MARION ERWIN,
Special Asst. to the Attorney General.

JOHN K. RICHARDS,
Solicitor General.

Supreme Court of the United States.

No. 365.—October Term, 1901.

Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, Appellants,
vs.
William Henkel, United States Marshal in and for the Southern District of New York.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[January 6, 1902.]

This case is brought here by the appellants for the purpose of obtaining a review of the order of the Circuit Court of the United States for the Southern District of New York denying their application for a writ of *habeas corpus*. The proceeding which led up to the application for the writ was commenced under section 1014 of the Revised Statutes, which reads as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a Supreme or Superior Court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

The appellants were at the time of the commencement of the proceeding non-residents of the State of Georgia, one of them being a resident of the State of Connecticut, two residing in the State of New York and one in the State of Massachusetts. The proceeding was inaugurated in the Southern District of New York, where one of the assistants of the United States district attorney for that district, on December 13, 1899, made a sworn complaint in writing before United States Commissioner Shields, residing in that district, which complaint in substance charged upon information and belief the commission by the defendants, in the Southern Dis-

trict of Georgia, of the crime of conspiracy to defraud the United States of divers large sums of money, by means of a fraudulent scheme devised by the defendants together with one Oberlin M. Carter, a captain of the corps of engineers, United States Army; that the scheme was first devised and put in operation in the Southern District of Georgia in or about the year 1891, and had been continously in process of execution there by the defendants from that time until October 1, 1899. The complaint also recites, with some detail, certain acts of the defendants by which the conspiracy was effectuated and accomplished, and it also stated that complainant's belief in regard to the charge made by him was based upon information contained in an indictment found by the grand jury of the United States District Court for the Southern District of Georgia, on December 8, 1899, and he alleged that bench warrants had been issued for the arrest of the defendants from the clerk's office of that court on December 9, 1899, and he was informed and believed that the defendants were then in the Southern District of New York. A certified copy of the indictment was attached and made a part of the complaint before the commissioner, who thereupon issued a warrant reciting the substance of the complaint, and directing the arrest of the defendants and their production before him to be dealt with according to law.

The defendants upon being notified of the issuing of the warrants at once appeared before the commissioner and asked for an examination, pending which they were enlarged upon bail. In the course of the examination, and in addition to the complaint already made, the assistant United States attorney for the Southern District of New York on January 13, 1900, filed a deposition detailing certain acts of one or more of the defendants performed by them in order to effect and further the conspiracy set forth in the indictment referred to in his original complaint.

Upon the examination, the defendants offered evidence tending to show a want of probable cause for believing them guilty of the charge made by the assistant district attorney. All evidence of this nature was objected to by counsel for the government and was excluded by the commissioner, who held that the indictment found in the district court in Georgia was conclusive evidence of probable cause, and that the only further evidence necessary was proof identifying the defendants as being the parties mentioned in the indictment, and this proof being given, the commissioner committed them to the custody of the marshal of the Southern District of New York until a warrant for their removal to the Southern District of Georgia should issue by the United States district judge for the Southern District of New York, or until they should otherwise be dealt with according to law.

Application was thereupon made by the district attorney to the United States district judge for the Southern District of New York for an order

for the removal of the defendants under section 1014 of the Revised Statutes. At the hearing upon such application the defendants maintained that the commissioner should have received the evidence of want of probable cause, which they offered, and thereupon the district judge made an order that, "after hearing on exceptions and on application for order of removal, ordered that the matter be referred back to the commissioner for taking further competent testimony as offered by either party in accordance with the opinion filed herein."

In the opinion which he filed the district judge held that the defendants were not concluded by the indictment, but were entitled to introduce evidence before the commissioner to show want of probable cause for believing them guilty of the offense charged.

Pursuant to the order of the district judge, the defendants again appeared before the commissioner, and a large amount of testimony *pro* and *con* was then taken by him on the question as to probable cause for believing the defendants guilty of the commission of the offense charged, as well as testimony concerning certain alleged irregularities in the drawing and organization of the grand jury which found the indictment upon which the removal of the defendants is sought. The irregularities consisted of alleged violations of the statute in relation to the drawing of jurors for the courts of the United States, (section 2 of the act of June 30, 1879, 21 Stat. 43,) and were, as the defendants claimed, of such character as to render the organization of the grand jury illegal and to prevent such illegal body from finding any valid indictment. After all the testimony was in that either party desired to produce, the commissioner on March 21, 1901, again committed the defendants to the custody of the marshal by an order, in which he stated that, "after full and fair examination touching the charge in the annexed warrant named, it appears from the testimony offered that there is probable cause to believe the defendants guilty of the charges therein contained." Application was then made to the district judge for an order of removal, which application was opposed by the defendants on the ground that the evidence showed that there was no probable cause for believing them guilty of the charge, and also because the indictment spoken of was wholly void on the grounds mentioned. After argument the judge decided that as to the objections of illegality in the drawing of the grand jury, they could be heard before the trial court, and its decision thereon, if erroneous, could be corrected in the regular course of appeal. Upon the subject of the evidence regarding probable cause the judge in the course of his opinion stated as follows:

"The commitment by the commissioner and his finding of probable cause have been made after an extremely full hearing of all the evidence offered on both sides. No evidence reasonably pertinent has been rejected. Objection is made that irrelevant and incompetent evidence offered by

the government was received by him; but, as stated in the former decision, the evidence receivable in such preliminary examinations is not to be strictly limited by the technical rules applicable upon the final trial; and upon a charge of fraud, or of conspiracy to defraud, a somewhat wide latitude in the testimony is always allowed even on the final hearing, for the purpose of showing the intent. The proof of the charges in this case does not consist of any direct and certain testimony of the commission of the offenses charged, but rests upon many facts and circumstances in a long course of dealing, from which it is claimed that the inference of an unlawful intent to defraud the government must reasonably be inferred; and the bills alleged to be fraudulent in the last counts of the indictment are claimed to be fraudulent, not so much because they were not according to contract, as because the contracts themselves were fraudulent, and procured through a fraudulent conspiracy with Captain Carter, an employe of the government. Considering the nature of the case, therefore, I find no such objections to the testimony admitted by the commissioner as to vitiate his findings or require reconsideration by him.

"As respects the finding of probable cause, I have carefully considered the very extended briefs and arguments of counsel, and have examined the voluminous evidence with a view to ascertain whether there was competent evidence before the commissioner sufficient in itself to sustain his finding of probable cause. Under the rule above stated, it is not for the judge, on an application for removal, to compare different parts of the testimony in order to determine their relative weight, or to substitute his own judgment for that of the commissioner, even though it might on the whole evidence be different. By this, however, I do not mean to be understood as expressing any opinion whatsoever on the merits of the case. The defendants have given a great deal of evidence tending to show that their contracts were fairly obtained, their work well and honestly done, and that the government has not been defrauded a dollar.

"The government, on the other hand, has given evidence tending to a contrary conclusion; and it has shown beyond question that Captain Carter, the employe of the government and the engineer in immediate charge of the work on the government's behalf, had for several years immediately preceding the contracts referred to in the indictment received from the contractors continuously, through his father-in-law, in many divisions of profits, one-third of the final net proceeds of each contract remaining for division among the chief contractors; and that this one-third amounted in the aggregate to over $700,000. This, it is claimed, gives significance and meaning to many other facts in evidence showing a fraudulent and illegal combination between the defendants and Captain Carter to benefit themselves at the expense of the government, and to procure the allowance and payment of excessive and fraudulent bills by means of contracts fraudulently procured.

"A case presenting such circumstances is especially one that should be submitted to a jury trial. Nor need there be any apprehension that an impartial court and jury will not reach essential justice, or that while guarding jealously the honor and interests of the government, they will not also appreciate the legitimate rights of the defendants, the peculiar difficulties, risks and hazards of such contract work, the excellence and merit of that which is well done, and the rights of the defendants by legitimate business methods to lessen competition and to secure as favorable contracts

as they can; and determine fairly whether the contracts in question were fraudulent, or obtained by illegal methods, or by a conspiracy with the engineer in charge to abuse the opportunities of his position in order to despoil the government and obtain exorbitant prices for their common benefit.

"Having found in the previous decision that the ninth and tenth counts of the indictment are good, whatever may be held as to the counts preceding them, the defendants should be ordered to be removed for trial, or to give bail for their due appearance."

An order was thereupon made and the warrant signed by the judge on May 28, 1901, for the removal of the defendants to the Southern District of Georgia. On June 8, 1901, the defendants were surrendered by their bail to the custody of the marshal, and on that day they presented their petition to the Circuit Court of the United States for the Southern District of New York for a writ of *habeas corpus*, setting out the foregoing facts and the order for removal, which they alleged to be illegal and in violation of their constitutional rights. They also alleged in their petition that they were not in the State of Georgia at the time of the filing of the indictment, nor had they been since that time, and that while they were in New York, and during the pendency of the proceedings before the commissioner to obtain their removal to the State of Georgia, and while they were under bail in such proceedings in the Southern District of New York, the United States district attorney of Georgia on March 5, 1900, in a letter written at Macon, Georgia, notified the attorneys of the defendants that the case would be called in the United States District Court at Savannah on March 12, 1900, in order that the defendants in the indictment might appear and present and interpose any objections which they might desire to urge as to the impannelling of the grand jury which returned a true bill of indictment in their case, and such other objections as they might make to the validity of the indictment. The petition then proceeded as follows:

"That your petitioners are informed and believe, that he now claims and insists that because of your petitioners' failure to appear as above required, that they are barred and estopped in that court from questioning the illegality and validity of said alleged grand jury. If this contention be sustained, then unless this court hears and passes on the said questions these petitioners will be tried on the alleged indictment in said court in Georgia, although the fact is that such indictment was never found by any legally organized grand jury, but was presented and filed in court by a body of men purporting to be a grand jury in whose selection and drawing every statute of the United States relating thereto was disregarded and set at naught."

It was also stated in the petition that the petitioners were held for trial for an infamous crime, without the indictment of a grand jury and in violation of the rights secured to them by the Constitution of the United States; that notwithstanding the invalidity of the indictment and the other facts stated in the petition, the United States marshal for the Southern

District of New York detained the petitioners and were about to remove them to the eastern division of the Southern District of Georgia for trial upon the pretended indictment, and in pursuance of the proceedings had before the commissioner, and the warrant of removal issued thereupon by the district judge; that the detention of the petitioners and their removal in pursuance of said proceedings and warrant were without authority of law, and that they were restrained of their liberty in violation of the Constitution of the United States, and that any further proceedings in pursuance thereof or the further detention or imprisonment of the petitioners would be unlawful. They therefore asked for a writ of *habeas corpus* to inquire into the lawfulness of their imprisonment. After a hearing upon the petition, the Circuit Court denied the application, and from the order denying the writ the defendants appealed to this court, which appeal was allowed and the defendants admitted to bail pending its decision.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

It will be noted that the proceeding leading up to the warrant for the removal of the defendants to Georgia for trial was inaugurated in the Southern District of New York by the sworn deposition of an assistant of the United States district attorney for the Southern District of New York, in which deposition it was alleged that an indictment had been found against the defendants in the United States District Court in Georgia, a certified copy of which indictment was attached to and made a part of the deposition. Upon the written charge thus made, the United States commissioner in New York issued his warrant for the arrest of the defendants, who upon being notified immediately appeared before him and an examination was proceeded with. Upon this examination the commissioner refused to receive evidence offered by the defendants tending to show a want of probable cause, and held that the certified copy of the indictment found in the District Court of Georgia was conclusive evidence of probable cause, and accordingly made an order committing the defendants to the custody of the marshal until a warrant for their removal should issue by the United States district judge for the Southern District of New York. Upon application to the district judge for such warrant he held that the indictment was not conclusive evidence of probable cause, and sent the case back to the commissioner, (*United States* v. *Greene*, 100 Fed. Rep. 941,) to hear evidence on that subject. On subsequent hearings before the commissioner evidence *pro* and *con* as to probable cause was given and also as to the drawing of the grand jury, and that officer decided that "after full and fair examination touching the charges in the annexed warrant named, it appears from the testimony offered that there is probable cause to believe the defendants guilty of the charges therein contained." And he there-

upon for the second time committed the defendants to the marshal's custody to await a warrant of removal to be signed by the district judge. When the application for the warrant of removal was made to that judge he held that a proper case was made out, and signed the order for removal.

From these facts it is apparent that the question is not before us whether the finding of an indictment is in a proceeding under section 1014 of the Revised Statutes conclusive evidence of the existence of probable cause for believing the defendant in the indictment guilty of the charge therein set forth. The district judge in this case held that it was not, and sent the case back to the commissioner, before whom evidence was thereafter taken upon the subject, and a decision arrived at after considering all the evidence in the case. We are not, therefore, called upon to express an opinion upon the question. Upon all the evidence taken before the commissioner he has found that probable cause existed. We think that a fair interpretation of the language used by the district judge in granting the application for the warrant of removal shows beyond question that, from the evidence taken before the commissioner, the judge was of opinion that there existed probable cause, and that the defendants should therefore be removed for trial before the court in which the indictment was found.

When the judge refers to the testimony taken before the commissioner, although he does in terms say that he expresses no opinion upon the merits, yet he states that upon the evidence before him, it is a proper case to be submitted to a jury for trial. That is in effect a finding of probable cause, which is not necessarily a finding that the persons charged are guilty. The meaning to be gathered from the language of the judge is that while there is evidence on the part of the government tending to show the guilt of the accused, there is also evidence on the part of the defendants tending to show their innocence, and that the determination of the question in such a complicated case should properly be left to a jury. He says that he has carefully considered the very extended briefs and arguments of counsel and has examined the voluminous evidence with a view of ascertaining whether there was competent evidence before the commissioner sufficient in itself to sustain his finding of probable cause, and he, in substance, finds there was, and grants a warrant for the removal of the defendants. This is perfectly consistent with the further statement made by him that he did not express any opinion whatsoever on the merits of the case. That is, he did not express an opinion whether upon all the evidence the defendants ought to be convicted or acquitted of the charge. He was not called upon to do so. It was sufficient, if all the evidence being taken into account, there existed such probable cause for believing the defendants guilty as to warrant their removal for trial of the offense charged. This is not expressing an opinion upon the merits, although the language of the judge is sufficient as expressing the existence of probable cause against the defendants.

The evidence which was taken before the commissioner and which was before the district judge upon the question of the existence of probable cause was not annexed to the petition and forms no part of the proceeding before the Circuit Court upon the application for the writ of *habeas corpus.* Whether that evidence was or was not sufficient for the commissioner to base his action upon or for the district judge to approve, was not a question before the circuit judge, and is not before this court. We must assume, in the absence of the evidence taken before the commissioner and approved by the district judge, that their finding of probable cause was sustained by competent evidence, bearing in mind also that on this proceeding the court would not in any event look into the weight of evidence on that question.

It is urged, however, that the offense charged, and upon which defendants are to be removed, is that which is contained in the indictment only, and if the indictment be insufficient for any reason, that then there is no offense charged for the trial of which the defendants can properly be removed to another district.

It is not a condition precedent to taking action under section 1014 of the Revised Statutes that an indictment for the offense should have been found. (*Price* v. *McCarty*, 89 Fed. Rep. 84; Circuit Court of Appeals, Second Circuit, June, 1898.) In this case there was a sworn charge *prima facie* showing the commission of an offense against the United States, cognizable by the District Court of the United States for the Southern District of Georgia. To substantiate the charge a certified copy of an indictment found in the Georgia court was produced, and in addition evidence was given before the commissioner which, as he found, showed probable cause for believing that the defendants were guilty of the offense charged in his warrant. If there were any uncertainty or ambiguity in the indictment, the evidence given upon the hearing before the commissioner may have cleared it up. We cannot assume that it did not, and on the contrary, if such uncertainty in the indictment did exist, we must assume that the evidence did clear up such uncertainty, or otherwise the commissioner would not have granted his warrant for removal, nor would his decision have been approved by the district judge.

The finding of an indictment does not preclude the government under section 1014 from giving evidence of a certain and definite character concerning the commission of the offense by the defendants in regard to acts, times and circumstances which are stated in the indictment itself with less minuteness and detail, and the mere fact that in the indictment there may be lacking some technical averment of time or place or circumstance in order to render the indictment free from even technical defects, will not prevent the removal under that section, if evidence be given upon the hearing which supplies such defects and shows probable cause to believe

the defendants guilty of the commission of the offense defectively stated in the indictment. It follows also that a decision granting a removal under the section named, where an indictment has been found, is not to be regarded as adjudging the sufficiency of the indictment in law as against any objection thereto which may subsequently be made by the defendants. That is matter for the tribunal authorized to deal with the subject in the other district. We do not, however, hold that when an indictment charges no offense against the laws of the United States, and the evidence given fails to show any, or if it appear that the offense charged was not committed or triable in the district to which the removal is sought, that the court would be justified in ordering the removal, and thus subjecting the defendant to the necessity of making such a defense in the court where the indictment was found. In that case there would be no jurisdiction to commit nor any to order the removal of the prisoner.

Upon this writ the point to be decided is, whether the judge who made the order for the removal of the defendants had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of *habeas corpus*.

Jurisdiction upon that writ in such a proceeding as this does not extend to an examination of the evidence upon the merits. The matter for adjudication is similar to that which obtains in cases of international extradition. In such case, if there is competent legal evidence on which the commissioner might base his decision, it is enough, and the decision cannot be reviewed in this way. (*Bryant* v. *United States*, 167 U. S. 104.) There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offense charged.

We do not think that under this statute the commissioner would be warranted in taking evidence in regard to the organization of the grand jury which found the indictment, as claimed by the defendants. The indictment is valid on its face; purports to have been found by a grand jury acting in fact as such at a regular term of a District Court of the United States, presided over by one of its judges and hearing testimony in the ordinary way. In our opinion, such an indictment is *prima facie* good, and when a copy of it is certified by the proper officer, a magistrate, acting pursuant to section 1014 of the Revised Statutes, is justified in treating the instrument as an indictment found by a competent grand jury, and is not compelled or authorized to go into evidence which may show or tend to show violations of the United States statutes in the drawing of the jurors composing the grand jury which found the indictment.

We agree with the district judge, that matters of that nature are to be dealt with in the court where the indictment is found, and we intimate no opinion

upon the merits of those questions. Whether the defendants have waived the right to raise them, or whether they could waive the same, are also questions that are not before us. They must be raised before and decided by the United States court sitting in the Southern District of Georgia, in the first instance, and we express no opinion as to their validity.

We do not think that by this order of removal the constitutional rights of the defendants are in anywise taken from them. The provision that no person may be held to answer for an infamous crime unless upon the presentment or indictment of a grand jury is not violated or infringed. If this so-called indictment be void for the reasons alleged, the place to set up its invalidity is the court in which it was found. The provision is certainly not violated when, under a proceeding such as this, upon a sworn complaint and upon evidence under oath which both magistrates have found to amount to probable cause, an order has been made for removing the defendants to the court within whose jurisdiction the offense is charged to have been committed and where all the defenses of the parties may be set forth in due and orderly manner and the judgment of the court obtained thereon.

The order denying the application for the writ, is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.